MISSISSIPPI LAW JOURNAL

In Memoriam

John H. Fox, Jr.

December 1965

VOLUME XXXVII NUMBER 1

THE J. E. NEILSON CO.

DEPARTMENT STORE

OXFORD, MISS.

The Best Place to Shop for More Than 100 Years

COMPLETE SETS OF THE MISSISSIPPI LAW JOURNAL NOW AVAILABLE AT THE FOLLOWING PRICE:

Volumes 1-36	$254.50
Less 10% discount for ordering entire set	25.45
	$229.05
Binding Cost	120.25
Total Cost of Complete Bound Set of the Mississippi Law Journal	$349.30

SEND ORDER TO

MISSISSIPPI LAW JOURNAL

P. O. Box 146

University, Mississippi 38677

Cooperating with attorneys...

Deposit Guaranty's Trust Department welcomes every opportunity of working with attorneys on estate planning for their clients. Such cooperative efforts help to bring financial security to many individuals and families in this area. Write or call us anytime.

TRUST DEPARTMENT

DEPOSIT GUARANTY NATIONAL BANK

Grow With Us

JACKSON, MISSISSIPPI

MEMBER FEDERAL DEPOSIT INSURANCE CORPORATION

Accounts insured to $10,000 by Federal Savings and Loan Insurance Corporation, a permanent agency of the United States.

The sum $10,000 dols 00 cts

One year ago, a gentleman sent us a check for $10,000 to open a savings account.

Today it is worth $10,429.52.

That's what 4¼%, compounded semi-annually, is all about!

Save where the real money growth is—First Federal of Jackson!
Open that account NOW—in person or by mail.

This chart shows how lump-sum amounts grow when left in your savings account for various periods of time, earning our 4¼% dividend compounded semi-annually.

HOW SAVINGS GROW	$50	$100	$500	$1,000	$5,000	$10,000
6 months	51.06	102.13	510.63	1021.25	5106.25	10212.50
1 year	52.15	104.30	521.48	1042.95	5214.76	10429.52
2 years	54.39	108.77	543.87	1087.75	5438.74	10877.48
3 years	56.72	113.45	567.23	1134.47	5672.34	11344.68
4 years	59.16	118.32	591.60	1183.20	5915.98	11831.96
5 years	61.70	123.40	617.01	1234.02	6170.08	12340.16
10 years	76.14	152.28	761.40	1522.79	7613.97	15227.95
20 years	115.95	231.89	1159.45	2318.90	11594.52	23189.04

First Federal Savings

AND LOAN ASSOCIATION/CAPITOL AT STATE, JACKSON, MISS.
BRANCHES: WESTLAND, MEADOWBROOK, YAZOO CITY

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXVII DECEMBER 1965 NUMBER 1

CONTENTS

MEMORIAL: John H. Fox, Jr. 1

LEADING ARTICLES

Recent Trends in Criminal Law, and Their Effects Upon Mississippi Practice ..... *W. N. Ethridge, Jr.* 9

A Historical Sketch of the Early Law School of the University of Mississippi: A Newly Found Memoir ... *Sylvester John Hemleben* and *Richard T. Bennett* 28

The Uniform Commercial Code: A Preview ..... *George W. Stengel* and *Don P. Lacy* 55

Bad Checks ..... *George Warner* 86

STUDENT COMMENTS

An Examination of Various Aspects of Intestate Succession in Mississippi 107

Punitive Damages in Mississippi—A Brief Survey 131

RECENT DECISIONS

Conflict of Laws—Applicable Law for Multi-State Tort Actions 157

Constitutional Law—Freedom of Speech in Postal Delivery of Communist Political Propaganda from Foreign Countries 159

Constitutional Law—Mapp Exclusionary Rule Not to be Applied Retroactively 162

Constitutional Law—Miscegenation—Equal Protection of the Laws 165

Constitutional Law—Televised Trial Violates Defendant's Rights Under Fourteenth Amendment 168

Constitutional Law—Right to Be Advised of the Right to Counsel State Misdemeanor Prosecutions 170

Constitutional Law—Sixth Amendment Right of Confrontation Applicable to the States Through the Fourteenth Amendment .. 174

Due Process—Power of State Courts to Assert Jurisdiction Over Foreign Corporation on the Basis of Commission of a Tort Within the State 177

Eminent Domain—Substitute Condemnation 181

Evidence—Prosecuting Witness Must Orally State Obscene Language Used by Defendant 183
Municipal Law—Registration of Voters Effective On Date of First Proper Application—Annexation by Municipal Corporations May Not be Deferred 185
Oil and Gas—Delay Rental Payment by Stranger to Lease 188
Tort Liability—Municipal Liability for Intentional Tort Committed by Police Officer 191
Unemployment Compensation—Disqualification for Benefits Due to Lack of Transportation to Work 194

RECENT BOOKS

Federal Taxation ..... *Joel Blass* 198
Manual for the Legal Secretarial Profession ..... *Mrs. Barbara Waldrop* 200

Entered as second class matter, November 25, 1936, at the Post Office at University, Mississippi, and Nashville, Tennessee, under the Act of Congress of March 3, 1879.
Published in December, March, May, and October

$4.00 Per Annum $1.50 Per Current Number

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXVII DECEMBER 1965 NUMBER 1

MEMBERS OF THE LAW JOURNAL BOARD

BAR COMMITTEE

JASON H. FLOYD, *Chairman*
Gulfport

L. O. SMITH, JR., *Co-Chairman*
Jackson

H. M. RAY, *Co-Chairman*
Oxford

WALTER R. BRIDGEFORTH
Yazoo City

CARY E. BUFKIN
Jackson

MAURICE DANTIN
Columbia

JOHN W. DULANEY, JR.
Tunica

W. CALVIN WELLS, JR.
Jackson

WILLIAM A. HUFF
Forest

MISSISSIPPI STATE BAR
1965-66

OFFICERS

ORMA R. SMITH of Corinth ..... President
JOHN T. ARMSTRONG of Hazelhurst ..... First Vice President
SHERMAN MUTHS, JR., of Gulfport ..... Second Vice-President
HARRY L. CASE, JR., of University ..... Director of Continuing Legal Education
MRS. ALICE NEVELS of Jackson ..... Executive Director and Secretary-Treasurer

COMMISSIONERS

ROBERT D. PATTERSON, Aberdeen
ALBERT SIDNEY JOHNSON, JR., Biloxi
LESTER F. SUMMERS, New Albany
RICHARD M. ALLEN, Indianola
WILLIAM D. BROOKS, Kosciusko
CLAY B. TUCKER, Woodville
N. W. OVERSTREET, JR., Jackson
MRS. MARY LIBBY PAYNE, Brandon
GEORGE W. ROGERS, JR., Vicksburg
DAVID WILLIAMS, Meridian
SHED HILL ROBERSON, Clarksdale
W. ARLINGTON JONES, Hattiesburg
GEORGE C. WILLIAMSON, Mendenhall
RALPH PEEPLES, Brookhaven
WILLIAM E. ANDREWS, JR., Purvis
ROBIN WEAVER, Columbus
HERBERT M. FANT, Sardis
STEWART J. GILCHRIST, Laurel
JOHN F. BRYAN, III, Pascagoula

Digitized by the Internet Archive
in 2012 with funding from
LYRASIS Members and Sloan Foundation

http://archive.org/details/mississippilawjo37wnet

In Memoriam

John H. Fox, Jr.

1901 - 1965

JOHN H. FOX, JR.

MEMORIAL

Professor John H. Fox, Jr. died in Memphis, Tennessee, on the seventh of October, 1965, after an illness of several months duration. He is survived by his wife, Marjorie G. Fox, and his sons John H. Fox, III, Clifford G. Fox, and Andrew C. Fox.

Professor Fox was born in Clinton, Mississippi, in 1901. He received a baccalaureate degree from Mississippi College, and professional degrees in law from the University of Mississippi and Yale University. After his admission to the Bar he spent several years in practice with the firms of Frazier, Spear & Meyer and Platt, Field, Taylor & Patterson in New York City. In 1926 he began practice in Jackson, Mississippi, from whence he entered teaching in 1930 at the Jackson School of Law. He joined the University of Mississippi faculty of Law in 1932, where he served continuously as a Professor of Law except for a leave of absence for the office of Price Administrator in 1942, and another leave of absence for service with the United States Navy from 1942-1945.

Besides teaching in the fields of Evidence, Contracts, and Bills and Notes, Professor Fox served as adviser to the Mississippi Law Institute, and as Acting Dean in the School of Law in the Fall of 1957, the Spring of 1962, and the regular session of 1963-64. For his accomplishments in the field of teaching he was awarded a Sterling Fellowship at the Yale University Law School in 1937.

More than seventy percent of the lawyers now practicing in the State of Mississippi received instruction at his feet. His classes were valued highly by all students because of his uncompromising insistence upon high standards of scholarship and recitation. For the last thirty years and more his has been the guiding force behind the University of Mississippi School of Law. In periods of crisis his presence served as a beacon and rallying point for the faint-hearted and the weary. On matters of principle he never compromised. Yet, to a student or faculty member in trouble he could show tenderness, understanding, and consideration beyond that of any other man I have known.

Truly the Law School has lost its greatest friend, staunchest supporter, and most able advocate. He will never be replaced.

Joshua M. Morse III, Dean
School of Law
December 7, 1965

STATEMENT BY ROBERT J. FARLEY*

Even his faults leaned to virtue's side

Shortly after my return to the Ole Miss Law School in 1946, which was largely at the persuasion of my old friend John Fox, we were walking around the Campus noting the changes that had occurred within our knowledge of the place, when John remarked: "You know when we were in school the faculty was made up largely of old men and now they are younger and there don't seem to be any new 'old characters' coming on." To which in relating this many times later, John claimed I replied, "I imagine the law students can think of two." Actually, I said, "they ought to be able to think of one, at least!"

Professor Fox was an 'old character' within the academic acceptance of the term at the age of thirty, when he began teaching at Ole Miss in 1932, a very proper person to fit into the pattern of great teachers who have individual traits of distinction, aside from their intellectual attainments and their facility in the communication of learning. One of these was an intense, almost fierce, loyalty to Ole Miss in every phase of its activities. In no one who ever taught there was this more evident than in John Fox. He never considered greener pastures. He spent the year 1937-38 as a Sterling Fellow doing graduate work at Yale from which he held already a bachelor of laws degree. He made no effort to get another degree, his justification being that it would make him no better teacher; its primary value being to secure a better position elsewhere. He never intended to move from Ole Miss—and he did not though he had other opportunities without the doctorate.

His reputation was soon made in Mississippi and gradually he was known over the South and eventually in the Association of American Law Schools, as one who would stand up for the profession as a lawyer and as a teacher against political and other odds. In fact there was no equivocation in him. There was never any reticence in his conviction on any controversy. He was a man of great courage, moral and physical, sometime to the point of needless indiscretion. He had no pretense or sham in his make-up save in the good manners of a gentleman and these he readily sacrificed if he thought one might be otherwise misled.

His method of teaching was largely the type of questioning to which he had been subjected after his study at Ole Miss, by such masters as William Howard Taft, Edmund Morgan, and Charles Clark

* Professor of Law, University of Florida, and former Dean of the University of Mississippi School of Law.

then at New Haven. Many students, beginning Contracts, heartily disliked and feared him. Before the year was out they generally admired him. With the next subject under him they were intrigued. After graduation, they couldn't wait to come back and call him by his first name, an acceptance which he understood and in which he delighted. Many were spurred to success to prove to him they were as bright as their grades indicated, a greater number to prove they were not as stupid as he made them out! As the years passed all appreciated him more and more and what he had done for them. It was his contention that it was better for him to embarrassingly point up their ignorance in class, than for an opposing attorney or a judge to do so in court. Given a series of facts, no one could analyze and resolve possible issues more quickly, cogently, or thoroughly. Given a Lord Kenyon type opinion, no one could dismember it more effectively. Given a question and no one, more resourcefully, as a fellow faculty member once said, could reach "further down in the barrel to come up with some old, rusty point of law." No one ever won an argument when he stated the proposition. In fact he seldom conceded, no matter who stated it!

Despite his long accusing forefinger aiming unerringly the blunt, dialectic series of questions, many students discovered to their amazement, what his older friends knew: that Old John Fox was an entirely different person from Professor Fox—get him out of class and he was one of the warmest, most accommodating and sympathetic of persons, and a delightful social or hunting or fishing companion. Students with extra-curricular problems found that he would have made an excellent priest for confidences, confessions, and advice.

He had a remarkable sense of humor as well as a remarkable gift of repartee, products of a quick mind with imagination. These, too, made him a colorful 'old character' since after any engagement with the small or the great, as a heckler at a baseball game or a quizzer of a visiting celebrity, he never came off second best and many were the quotable quotes. Sometimes his wit was so sharp and piercing that the feelings of the recipient were hurt—a matter which it was difficult for him to understand since he meant nothing personal. Frequently when we were speaking from the same platform, I have pointed out to the audience that it was good to be a friend of John, because, like James Thurber's dog, he didn't bite friends as often as he did strangers. Here again was a characteristic. John himself never spared a friend in any kind of administration—school, court, state, church or business—but his intense sense of loyalty required him to defend the same friend most vehemently from the attacks of others. He would never eat his words; he merely re-interpreted them very satisfactorily and adeptly, if occasion required.

Until his last days he was vigorously young in deed and in spirit, impatient with lethargy of mind and body, interested in youth and life

and living. The race problem gave him much conflict of emotions, being by birth and ancestry an unmixed Southerner, dedicated to the law, a man of conscience and of justice, but he had no real hesitation in conviction or decision. Aside from his innate patriotism as a citizen of the United States, the debasement of the Confederate flag into an emblem of the mob, raised his anger immeasurably. Incongruously he was frequently bitter in his own condemnation of Mississippians but resentful in defense of them from criticism by outsiders.

Death has left its sting in our loss of his physical presence but the grave has no victory. "The Great White Father" as he came to be known to two generations of lawyers will live in affectionate memory of them and a third generation at least. His impact on the law and the effect of his teaching will last long after the boys cease to gather at meetings and "remember that time!"

STATEMENT BY JOHN A. TRAVIS, III*

During the past thirty-two years while John H. Fox, Jr. served so ably as professor at the University of Mississippi School of Law, the lives of students, teachers, attorneys, and judges were enriched through their association with him. Although his work is done, his influence on the bench and bar of Mississippi will be felt for years to come.

Mr. Fox approached the processes of law with a large degree of skepticism. He seldom accepted an idea or opinion, regardless of how respectable its antecedents, precedents, or references, without examining it for himself. He never subscribed to a point of view because it was popular or represented a consensus. In fact he abhorred slavish adherence to precedent as evidenced by his teaching and writings. His was a great mind and one that was constantly questioning, exploring, searching, probing, analyzing, and challenging. He was never content to blindly accept so-called "rules of law," but was always seeking premises and exposing fallacies in the law. He sought to teach intellectual self-reliance, confidence, and courage, and in accomplishing this he made certain that one had an opponent no matter what statement he made or side he took. John Fox often taught as much "Foxology" as he did law, but this is characteristic of gifted law professors. He taught not only the processes of law and "Foxology," but also endeavored to equip his students with the tools of an attorney. In essence he possessed most of the attributes indicative of the successful law professor.

No one is likely to forget the unique and colorful personality of John Fox. Nor is the imposing stature of the "Great White Father," as he stood inside the threshold of the north classroom, likely to be forgotten by any who have studied under his tutelage. His salient white hair enhanced his distinguished appearance, and we who have known and studied under him will always remember this dignified gentleman and scholar. Nor can we forget his wit which he frequently displayed in the classroom, among friends, in professional meetings, and in the baseball bleachers. These characteristics, among others, contributed to the legend of John Fox.

Mr. Fox loved his students, although some have reason to doubt this, and he gave unceasingly of his time and energy to aid them in their various fraternal and social activities. Through the years he served as advisor, counselor, and friend to the editors and other staff members of the Mississippi Law Journal. He was always pleased to make a few remarks or deliver an address at a banquet sponsored by his

* Attorney-at-Law, United States Army, San Francisco, California.

legal fraternity, Phi Delta Phi. The members of Omicron Delta Kappa, honorary leadership fraternity, selected him as their faculty advisor for a number of years. This memorial would be incomplete without mentioning his lifelong association with, and service to, his social fraternity, Beta Theta Pi. He is responsible in large measure for the current success of this group at Ole Miss. In addition to his participation in the aforementioned activities he was an ardent baseball fan as well as a participant in the law school's social functions. Mr. Fox mingled with the students on these many occasions because of his interest in them and his belief that to become a successful attorney one must be well-rounded.

John Fox taught law because he enjoyed it, and he derived a large measure of satisfaction from it. His flawless courage and his love of teaching were both asserted when, in the waning months of his life, he continued to teach when lesser men would long since have dispaired. In these last months he knew no fear and no self-pity.

The depth of his knowledge, his lofty standards of scholarship, and his mastery of the English language, spoken as well as written, made him a great teacher, respected and admired by thousands of students now practicing throughout Mississippi and the United States. In closing I can only state that I am very grateful that I had the privilege of learning from John Fox.

STATEMENT BY J. W. BUNKLEY, JR.*

My earliest memory of John Fox, an old and loyal friend, was the first class in Bills & Notes in 1945. John was still in Navy uniform, having just returned from active duty. He was extremely proud of the service and he continued as a reserve officer until his retirement shortly before the end. In the classroom, John was a master, teaching the mediocre to think and stimulating the better students to match wits with him. Few, if any, could do so. His keen insight into any complex problem and his overwhelming quickness and logic in rebutting any proposition with which he disagreed were his trademarks. At coffee with his students, John could and would take the unpopular side of an argument and more times than not come out the best.

Perhaps the most striking quality attributable to the "Great White Father," a term of endearment bestowed upon him by his students, was that of unswerving loyalty, not only to his country and state but to his personal friends for whom he would turn heaven and earth in time of need. Having served with him for twenty years I can personally testify to this fact. No more loyal son has Ole Miss had in its long history. John thought in terms of excellence in a law school and would give unselfishly his time and strength to accomplish this end. He was forever striving for betterment of his law school and an upgrading of his profession. An active alumnus in every endeavor he undertook, he was always ready when called upon by his Alma Mater.

Perhaps the following will illustrate to what ends John Fox would go in support of Ole Miss and those he loved. He and a student were fishing up the Tallahatchie River, miles from the nearest civilization. The motor on their boat broke down and night was near at hand. A motor was heard in the distance and their hopes arose. Two fishermen arrived on the scene and pulled up to John's boat to assist in repairing the motor. As conversation progressed, John learned that those in the other boat were from Alabama and were over for the weekend to see the Alabama-Ole Miss baseball game. An argument ensued regarding Ole Miss' chances the next day. John, enraged, shoved the stern of the other boat away, uttering some oaths and exclaiming that this would have to be the last boat in the river before he would accept aid from this source. To this his student companion exclaimed, as he clutched the bow of the other boat, "But Mr. Fox, this is the last boat!"

Long will John Fox be affectionately remembered in the annals of Ole Miss by those connected with that institution, and in the law teaching profession throughout the land, as one of the true giants among men.

* Professor of Law, University of Mississippi.

Mississippi Law Journal

VOLUME XXXVII DECEMBER 1965 NUMBER 1

RECENT TRENDS IN CRIMINAL LAW, AND THEIR EFFECTS UPON MISSISSIPPI PRACTICE

*W. N. Ethridge, Jr.**

The past few years have witnessed unprecedented changes in criminal law. That is the major area in which the Supreme Court of the United States has exercised an increasingly strict supervision over state criminal procedures. The method of accomplishing this has been by incorporating most of the Bill of Rights (first eight amendments of Constitution) into the fourteenth amendment as limitations on state power. The dominant theme has been toward uniformity and away from diversity. So, the major changes have been the results, direct and indirect, of federal constitutional decisions. Moreover, higher professional and educational standards of the bar have resulted in more varied and effective defenses of those charged with crimes. Finally, legislative enactments and judicial decisions of the states have implemented an increased public awareness of the need to protect more adequately the rights of an accused.

In short, from these three sources, federal constitutional decisions and state legislative and judicial decisions, have come the significant current developments in criminal law. The ever-present problem is that of balancing the rights of an accused against the protection of society from law violators. I will not discuss, except incidentally, whether these trends are good or bad. That may be for another time and place. However, the fact is that for the practicing lawyer and the judge these decisions vitally affect the prosecution and defense of criminal actions. My limited task is to state what these significant developments are, and to analyze their meaning in the administration of criminal justice.

I. Right to Counsel

These issues stem from two United States Supreme Court decisions: *Gideon v. Wainwright* in 1963, and *Escobedo v. Illinois* in 1964.

In *Gideon v. Wainwright,*[1] the defendant was convicted of breaking

*(An address, as revised, of Mississippi Supreme Court Presiding Justice W. N. Ethridge, Jr., of Oxford, Mississippi, on April 1, 1965, before Criminal Law Seminar, of Mississippi State Bar and University of Mississippi School of Law, in Jackson, Mississippi)

[1]372 U.S. 335 (1963).

and entering with intent to commit a misdemeanor, which is a felony under Florida law. The Florida court later denied his habeas corpus petition, and Gideon appealed from that denial. Reversing, the Court overruled *Betts v. Brady*,[2] and held that counsel must be supplied an indigent defendant where requested in state criminal proceedings and not merely where special circumstances warrant such appointment. The sixth amendment to the Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The sixth amendment's guarantee of counsel is a limitation and restriction upon the power of the states under the fourteenth amendment. *Gideon* said "that in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[3]

In 1964, the Mississippi Legislature recognized the effect of *Gideon* by amending Section 2505 of the Code to give authority to trial courts to appoint counsel for those charged with a felony less than capital.[4] In *Conn v. State*,[5] the Mississippi Supreme Court reversed and remanded Conn's conviction of receiving stolen property. He had no attorney and appealed by pauper's affidavit. As to whether he waived counsel, the record reflected only that upon arraignment the defendant appeared, and "being by the court advised as to his right to the benefit of counsel," pleaded guilty. The opinion discussed at length the *Gideon* case, and held that "there must be an intelligent and competent waiver of counsel by the defendant and . . . the trial court should so determine, and, further, that such determination, as well as the facts on which it is based, should appear in the record."[6] *Gideon* eliminated the question of discretion in appointing counsel in noncapital felonies for indigent defendants. No intelligent and competent waiver of counsel was reflected in that record.

Robert Clarke was convicted of assault and battery with intent to kill. He was indigent, unable to afford counsel, and was tried without an attorney representing him. After conviction, on motion for new trial, his new attorney contended successfully there was no effective waiver of his constitutional right to counsel. Following *Conn v. State*, the court said: ". . . the trial court has the responsibility to determine affirmatively, and the record should reflect the pertinent facts on these issues. The court should advise the accused of his right to the assistance of counsel, should ascertain whether he is indigent, and should deter-

---

[2]316 U.S. 455 (1942).

[3]Gideon v. Wainright, 372 U.S. 335, 344 (1963).

[4]Miss. Code Ann. § 2505 (Supp. 1964).

[5]170 So. 2d 20 (Miss. 1964).

[6]*Id.* at 23.

mine by inquiries reflected in the record whether there is an intelligent and competent waiver of counsel by the defendant."[7]

In short, the Mississippi Supreme Court applies *Gideon* and the 1964 statute, and holds that one who is indigent and unable to afford counsel in a non-capital felony case is entitled to have the court appoint counsel for him, unless there is an intelligent and competent waiver. The record must affirmatively reflect all facts showing an intelligent and competent waiver of counsel.

Gideon of course has many implications. One question is whether it is retroactive, that is, whether it affects convictions which became final before the decision of *Gideon* in 1963. The answer is rather clear that retroactive application comes as a matter of course, primarily by way of post-conviction remedies. *Linkletter v. Walker,*[8] and *Angelet v. Fay,*[9] held that the rule excluding illegally seized evidence, under the fourth and fourteenth amendments and *Mapp v. Ohio,*[10] has only prospective application; that in illegal search and seizure cases, prospective application promotes that purpose. However, the court observed that coerced confession and right to counsel cases are applied retroactively to convictions obtained before a change of decision by the federal court. Hence the right to counsel for indigents applies retroactively.[11]

Secondly, the Court has held that due process requires that the right to counsel must cover appellate as well as trial proceedings.[12] Accordingly, the Mississippi Supreme Court on February 16, 1965, promulgated Rule 37,[13] which provides that where an appellant is indigent and does not intelligently and competently waive the appointment of counsel in the supreme court, that court may request the trial court or trial judge in vacation to determine whether he is indigent and desires counsel, and if not, whether he intelligently and competently waives appointment of a lawyer. The trial court must make a transcript of the hearing on these issues, and in proper cases may appoint counsel to represent appellant on his appeal. The *Gideon* doctrine would also seem to apply to post-conviction remedies.[14]

A third question arising from *Gideon* is whether the right to counsel applies to criminal offenses less than felony. This has not yet been authoritatively answered. Justice Harlan, concurring in *Gideon,* stated that the right extends to offenses which carry "the possibility of a sub-

[7]Clarke v. State, 170 So. 2d 575, 576 (Miss. 1965).

[8]85 Sup. Ct. 1731 (1965).

[9]85 Sup. Ct. 1750 (1965).

[10]367 U.S. 643 (1961).

[11]Linkletter v. Walker, 85 Sup. Ct. 1731, nn. 13-14 (1965); Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

[12]Douglas v. California, 372 U.S. 353 (1963); *In re* Broom's Petition, 168 So. 2d 44 (Miss. 1964).

[13]36 Miss. L. J. 182, 202 (1965).

[14]Griffin v. Ilinois, 351 U.S. 12 (1956).

stantial prison sentence."[15] *Harvey v. Mississippi*,[16] applied this rule to a misdemeanor. Harvey was convicted in a justice of the peace court in Leake County of possession of intoxicating liquor, a misdemeanor. He was fined $500 and given 90 days in jail. He was later released on habeas corpus by the Court of Appeals for the Fifth Circuit. It was contended that he pleaded guilty in the justice of the peace court and waived counsel. The court said that the right to assistance of counsel when entering a guilty plea applies in state as well as federal tribunals[17] and held that the failure to advise defendant of his right to counsel invalidated his plea of guilty. Although other precedents involved felony convictions, "their rationale does not seem to depend on the often purely formal distinction between felonies and misdemeanors. . . . Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon."[18] The *Gideon* doctrine is implicit in misdemeanor charges involving substantial penalties. The failure to notify Harvey of his right to the assistance of counsel invalidated his guilty plea, and rendered his conviction void. It is more than likely that the United States Supreme Court will hold that the *Gideon* rule applies to misdemeanor charges carrying substantial penalties.

The fourth and perhaps most significant question stemming from *Gideon* is at what stage in the proceedings does this right to counsel exist. Before trial, when does it apply? The right to counsel exists at a preliminary hearing before a magistrate in which an accused pleads guilty to a charge of a capital offense.[19] The Court held that the preliminary hearing was a critical stage in the proceedings, and only the presence of counsel could have enabled accused to know all the defenses available to him and to plead intelligently.[20] In short, the right to counsel certainly exists at an arraignment and probably at a preliminary hearing, particularly where an accused pleads guilty.

Massiah v. United States[21] established a broad right to counsel at post-indictment interrogations. The petitioner was indicted for violating federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. Colson, his codefendant, decided to cooperate with the police and allowed Murphy, a federal agent, to install a radio transmitter in his car. Murphy was thus enabled to overhear incriminating statements made by Massiah in a subsequent conversation with Colson and later testified to these statements at trial. The

---

[15]Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (concurring opinion).
[16]340 F.2d 263 (5th Cir. 1965).
[17]White v. Maryland, 373 U.S. 59 (1963).
[18]Harvey v. Mississippi, 340 F.2d 263, 269 (5th Cir. 1965).
[19]*Ibid.*
[20]Hamilton v. Alabama, 368 U.S. 52 (1961).
[21]377 U.S. 201 (1964).

Supreme Court, reversing his conviction, did not reach a fourth amendment claim based on the use of the secreted radio equipment. It held that introduction in a federal court of incriminating statements, elicited by federal agents after indictment and in the absence of counsel, violated the fifth and sixth amendments.

Escobedo v. Illinois[22] dealt with the question of when the right to counsel begins. Apparently that case holds that it attaches as soon as a police investigation ceases to be general and begins to "focus" on a suspect. The petitioner was arrested, taken to police headquarters, and interrogated until he made a statement implicating himself in his brother-in-law's murder. At no time during the interrogation was he advised of his right to remain silent, nor was he permitted to consult with his lawyer despite repeated requests by both. However, his lawyer had previously advised him not to answer any questions. The incriminating statement was admitted in evidence and Escobedo was convicted of murder. The Illinois Supreme Court upheld the conviction.

Mr. Justice Goldberg, writing for a majority of five, reversed the state court, saying:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as made obligatory upon the States by the Fourteenth Amendment, . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial. . . .
> Nothing we have said today affects the powers of the police to investigate 'an unsolved crime,' . . . by gathering information from witnesses and by other 'proper investigative efforts' . . . . We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.[23]

Both *Massiah* and *Escobedo* also involve the privilege against self-incrimination under the fifth amendment. The primary object of police interrogation is to obtain incriminating statements from the accused. *Escobedo* impliedly holds that in a pretrial police interrogation, the accused has a right to remain silent. Before any incriminating statements will be admissible, he must intelligently waive this right.

---

[22] 378 U.S. 478 (1964).
[23] *Id.* at 490-92.

By holding that a suspect must be effectively warned of his rights when the interrogation shifts from investigatory to accusatory, the Court recognized that the interrogation which follows arrest is a critical stage in the effort to establish guilt. Here again the proposition is not settled, but it would appear likely that the suspect's new right to be effectively warned may be extended to the time of arrest.[24] *Escobedo* will drastically affect police interrogation, and the use of self-incriminating statements. Moreover, the test of *when* the investigation begins to focus on a suspect is so subjective as to create serious evidentiary problems. Possible implications and further applications of these cases to the foregoing situations could place a serious handicap upon investigation and detection of crimes.

A recent case from California refused to read *Massiah* and *Escobedo* as requiring the defendant to make a request for an attorney.[25] The court reversed the capital-offense conviction of a San Quentin prisoner who killed a fellow inmate. It held his confessions were inadmissible because they were made at a time when he did not have counsel. Physical evidence linked the defendant to the crime the same day of its commission, and he was questioned by prison officials and members of the prosecuting attorney's office. Early in the afternoon he voluntarily admitted the killing and his part in it. These incriminating statements were admitted at the trial. At no time did he ask for an attorney, and he was not warned of his right to remain silent. The court said that once the investigation focused on defendant, any incriminating statements given by him during interrogation became inadmissible, in the absence of counsel, where the officers failed to advise defendant of his rights to an attorney and to remain silent. The court refused to read *Massiah* and *Escobedo* as requiring defendant to make a request for an attorney.[26] The right precludes the use of incriminating statements, unless it is intelligently waived.[27]

The question is whether an incriminating statement by a suspect under interrogation by the police must be excluded from evidence, when he was not advised of his rights to remain silent and to have counsel. The majority of the federal courts of appeal and state supreme courts which have passed on this issue limit *Escobedo* to the circumstances of that case, where the suspect either had or requested counsel, asked for him to be present during the interrogation, and the request was

---

[24]See Kurland, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 217-23 (1964).

[25]California v. Dorado, 42 Cal. Reptr. 169, 398 P.2d 361 (1965), *cert. denied* 85 Sup. Ct. 1765 (1965).

[26]*Ibid.*

[27]California v. Schader, 44 Cal. Rptr. 193, 401 P.2d 665 (1965); California v. Anderson, 40 Cal. Reptr. 257, 394 P.2d 945 (1964).

denied.[28] On the other hand, a minority of courts follow an expanded interpretation of *Escobedo*. They hold that police interrogation focused on a suspect can not produce admissible incriminating statements, if before the examination has begun the suspect is neither informed of his constitutional right to remain silent nor given the opportunity to consult a lawyer. They are California,[29] Rhode Island,[30] and the Court of Appeals for the Third Circuit.[31]

In June 1965, the Supreme Court denied certiorari both in *Dorado*,[32] and the *Hartgraves*[33] case from Illinois, which limited *Escobedo* to its facts. So, how far this doctrine may extend is presently uncertain.

In summary, an accused is entitled to counsel, unless he intelligently waives it, at post-indictment interrogations, and much earlier, as soon as the police investigation ceases to be general and investigatory, and begins to focus on a suspect. These decisions severely handicap police interrogations. In any given circumstances, the right of an accused must be balanced in a rational and practical manner with the interest of the public in the enforcement of the criminal laws. The pendulum, I think, has swung too far in favor of the accused. Yet the skilled lawyer defending persons charged with crimes should be aware of and utilize these decisions in the defense. On the other hand, these cases present serious problems for prosecuting attorneys. For the trial judge, in many instances, they will present difficult issues, and frequent headaches.

II. Self-Incrimination and Confrontation

Two recent decisions held the fifth amendment's privilege against self-incrimination applicable to the states through the due process clause of the fourteenth amendment. They rejected the prior rule that the privilege does not extend to incrimination under the laws of another jurisdiction. In *Malloy v. Hogan*,[34] Malloy was convicted of gambling. When ordered to testify later at a state gambling inquiry, he refused to disclose the names of his associates in the 1959 misdemeanor, and was sentenced to jail for contempt. The Connecticut Supreme Court denied habeas corpus. The United States Supreme Court reversed, and

---

[28]Commonwealth v. Tracy, 33 U.S.L. Week 2620 (Mass. 1965); Biddle v. Commonwealth, 141 S.E.2d 710 (Va. 1965); Conroy v. Pate, 33 U.S.L. Week 2545 (Ill. 1965); Gordchild v. Burke, 33 U.S.L. Week 2544 (Wis. 1965); Scamalorene v. Commonwealth, 33 U.S.L. Week 2632 (Ky. 1965).

[29]California v. Dorado, 42 Cal. Reptr. 169, 398 P.2d 361 (1965), *cert. denied* 85 Sup. Ct. 1765 (1965).

[30]State v. Mendes, 33 U.S.L. Week 2645 (R.I. 1965).

[31]Russo v. State, 33 U.S.L. Week 2621 (3rd Cir. 1965).

[32]California v. Dorado, 42 Cal. Reptr. 169, 398 P.2d 361 (1965), *cert. denied* 85 Sup. Ct. 1765 (1965).

[33]Illinois v. Hartgraves, 202 N.E.2d 33 (Ill. 1965), *cert. denied* 85 Sup. Ct. 1104 (1965).

[34]373 U.S. 1 (1964).

held that the privilege against self-incrimination under the fifth and fourteenth amendments is available in the state courts. The federal standards for determining whether a likelihood of incrimination has been shown also applies to the states. Applying the federal standard, the Court held that petitioner had shown a sufficient possibility of incrimination to justify his refusals to answer. The significant aspect of this case is that the federal test for invocation of the self-incrimination privilege is much more favorable to the witness than those of most states.[35] The federal courts tend to disregard the factual context in which questions are asked. Their decisions indicate that some types of questions always carry a possibility of incrimination.[36] *Mason v. United States*[37] stressed the trial judge's discretion to decide whether or not to grant the privilege. That discretion is now severely limited. The present ambiguous test should be revised to require a stronger showing of possible incrimination by the witness. Otherwise, state and federal authorities can compel testimony only by granting immunity from prosecution.

In *Murphy v. Waterfront Commission of New York Harbor*,[38] petitioners appeared before the commission, a two-state agency, and were granted immunity from prosecution under the laws of New York and New Jersey. They nevertheless refused to answer, on the ground that their answers might tend to incriminate them under federal laws from which the immunity did not protect them. They were convicted of contempt, and the Supreme Court of New Jersey affirmed, holding that a state could compel testimony incriminating under federal law. The United States Supreme Court vacated the contempt conviction, but affirmed the judgment ordering petitioners to answer the question. The controlling opinion held that a witness could claim the self-incrimination privilege in a state proceeding when asked to give answers which might incriminate him under federal law. In order to continue the effectiveness of state immunity statutes, it held that when a state compelled testimony under a grant of immunity, the testimony and its fruits would be inadmissible in a federal prosecution. *Murphy* does not answer the question of whether it prevents officials of one state from compelling testimony incriminating under the laws of another state. The state cases are divided as to the effect of incrimination under the laws of another state, but the reasoning of *Murphy* probably will bar compulsion of such testimony, absent an immunity from prosecution in other states. A multi-state immunity grant like that found in *Murphy* would cover this objection.[39]

---

[35]Hoffman v. United States, 341 U.S. 479 (1951).

[36]Note, 70 HARV. L. REV. 1454 (1957).

[37]244 U.S. 362 (1917).

[38]378 U.S. 52 (1964).

[39]See Kurland, *The Supreme Court, 1963 Term*, 78 HARV. L. REV. 143, 223-30 (1965).

The sixth amendment's guaranty protecting an accused's right to confront the witnesses against him was made obligatory on the states by the fourteenth amendment. In *Pointer v. Texas*,[40] the defendant was tried in a Texas court on a charge of robbery. The state, over his objections, introduced the transcript of a witness's testimony given at the preliminary hearing, at which defendant was not represented by counsel and had no opportunity to cross-examine the witness. The state showed that the witness had moved to California, with no intention to return. Defendant's conviction was affirmed by the Texas court, but the Supreme Court of the United States reversed. It was held that use of the statement at the trial denied petitioner any opportunity to have the benefit of his counsel's cross-examination of the principal witness against him. The sixth amendment's confrontation guaranty is enforceable against the states. This right is measured by the same standards whether it is denied in a federal or state proceeding.

Douglas v. Alabama[41] expanded the rule of the *Pointer* case. The defendant was charged in an Alabama court with assault with intent to murder. An accomplice, Loyd, was found guilty in a previous separate trial, and when called as a witness in defendant's trial, invoked his privilege against self-incrimination. The state's attorney then produced a confession signed by Loyd, and, in the guise of cross-examination to refresh the witness's recollection, purported to read from the document; repeatedly, after every few sentences Loyd refused to answer whether he made the statements embodied in these sentences. Subsequently, the state called law enforcement officers who identified the document as the accomplice's confession, but it was not offered in evidence. Stating that *Pointer* held the confrontation clause of the sixth amendment is applicable to the states, the Supreme Court reversed Douglas' conviction by holding that these facts constituted a denial of the accused's constitutional right of confrontation. His inability to interrogate Loyd as to the alleged confession denied him the right of cross-examination, and, although the reading by the state's attorney of Loyd's alleged statement, and Loyd's refusals to answer were not technically testimony, they tended to create in the jury's mind inferences that Loyd made the statement, and that it was true. Effective confrontation of Loyd was possible only if he affirmed the statement as his.

Thus the existence and the extent of the confrontation privilege are determined by the same standards in both federal and state courts, under the sixth amendment. The decision in *Douglas* indicates that the Court will apply a broader and less flexible test of this privilege than that utilized by many state courts.[42]

---

[40] 85 Sup. Ct. 1065 (1965).

[41] 85 Sup. Ct. 1074 (1965).

[42] *Cf.* Hall v. State, 165 So. 2d 345 (Miss. 1964).

III. Preliminary Hearing Without Unnecessary Delay

Earlier decisions have held that detention without commitment before a magistrate is one among other factors in considering whether a confession is free and voluntary.[43] However, unreasonable delay in bringing an accused before a committing officer may result in exclusion of confessions obtained during such unreasonable detention, under recent decisions of the Mississippi Supreme Court, and under federal constitutional principles and decisions.

Section 2473 of our Code provides: "Every person making an arrest shall take the offender before the proper officer without unnecessary delay for examination of his case." In *Harper v. State*,[44] Harper's conviction for attempted rape was reversed and remanded, on the ground that the state had not rebutted a prima facie case of systematic discrimination against Negroes in jury service. Immediately after his arrest, Harper made an oral confession. About three days after his arrest, he gave a written confession. He was not given a preliminary hearing before indictment, sometime after the arrest, nor did he have an attorney prior to that time. The sheriff stated that Harper waived before him a preliminary hearing, but the court held that the sheriff had no power to accept such a waiver, which must be done before a magistrate. On the question of a preliminary hearing, the court said:

> A preliminary hearing should have been held, by carrying appellant before a magistrate, advising him of the nature of the charge, and permitting him to plead to it, or giving him an opportunity to waive preliminary hearing, if he wished. . . .[45] However, the failure to carry Harper before a judicial officer shortly after his arrest did not entitle him to a directed verdict of not guilty. . . . Generally, detention without commitment is one among other factors in considering whether a confession is free and voluntary. . . . In this case the admissible oral confession was made by Parker almost immediately after his arrest, before any opportunity existed to bring him before a magistrate. Section 2473 means what it says, and police officers should take an accused before a judicial officer for preliminary hearing "without unnecessary delay." Winston v. State, 209 Miss. 799, 48 So. 2d 513 (1950). But the legality of the detention after the lawful arrest is not the issue here.[46]

In *Dunning v. State*,[47] defendant's conviction of armed robbery was affirmed. Dunning was arrested on the morning of September 5, 1963, and was given a preliminary hearing on September 9. One of the intervening days was Sunday, and the judicial officer before whom

---

[43]Gordon v. State, 160 So. 2d 73 (Miss. 1964).

[44]171 So. 2d 129 (Miss. 1965).

[45]*Id.* at 131.

[46]*Id.* at 131-32.

[47]171 So. 2d 315 (Miss. 1965).

the preliminary hearing was had did not keep office hours on Saturday afternoons,

> thus leaving unexplained three and one-half days in which there could have been a preliminary hearing. Assuming, but not deciding, this interval to be undue delay, we are cited no authority to the effect that such delay entitled the victim thereof to an outright discharge, and we do not understand the case of Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957), in construing the requirements of rule 5(a) of the Federal Rules of Criminal Procedure to so hold. Mallory deals with the admissibility of confessions. The confessions here were made prior to the unlawful detention, if any. Without the confessions the overwhelming weight of the evidence reflects defendant's guilt. Assuming this delay to be unreasonable, the illegal delay would not be retroactive so as to vitiate the legal evidence theretofore obtained.[48]

The teaching of both *Harper* and *Dunning* is that code section 2473 means what it says. Police officers should take an accused before a judicial officer for preliminary hearing, "without unnecessary delay." In both of those cases the oral confessions were made prior to any unlawful detention. *Dunning* indicated the court thought the three and one-half days delay in commitment might well be unreasonable. Certainly, police officers are required by code section 2473 and these decisions to take one accused of a crime before a judicial officer for preliminary hearing without unnecessary delay. We are all aware that this has not been done in many instances in this state. Prosecuting attorneys and trial judges should see to it that police officers understand clearly their duty to take a person accused of a crime before a committing officer "without unnecessary delay;" in other words, within a reasonably short time after his arrest.

A further complicating factor in this problem of a reasonably prompt preliminary hearing stems from the *McNabb-Mallory* Rule, referred to in *Dunning v. State*.[49] The federal rule is based upon Criminal Procedure Rule 5(a). However, the United States Supreme Court may hold that the federal constitution requires states to furnish a reasonably prompt appearance before a committing officer. The fifth amendment is applicable to the states by incorpration in the fourteenth amendment. The provisions of the fourteenth amendment might well be held to prohibit a state from using evidence of incriminating statements or confessions obtained after unreasonable delay in bringing an accused before a committing officer. Thus the *McNabb-Mallory* Rule could be a constitutional limitation upon the states in their criminal prosecutions.

In short, because the state statute, the state judicial decisions, and

---

[48] *Id.* at 320.

[49] 171 So. 2d 315 (Miss. 1965).

the federal decisions require that police officers take an accused before a judicial officer for a preliminary hearing without unnecessary delay, and confessions obtained thereafter are inadmissible, it is necessary to insist upon compliance by law enforcement officers with the Constitution and the statute in this respect.

IV. Selection of Juries

Since 1880, it has been settled law that systematic and discriminatory exclusion of Negroes from jury service violates the fourteenth amendment of the United States Constitution. Also, long-continued omission of Negroes from jury service establishes a prima facie case of systematic discrimination. The burden of proof is then upon the state to rebut it. In recent years, criminal convictions in a number of counties have been reversed because of such systematic exclusion.[50]

Furthermore, it has been well established by decisions of the United States Supreme Court that token summoning of a few Negroes for jury service does not comply with the equal protection clause. Accordingly, in *Harper v. State*,[51] the Mississippi Supreme Court by unanimous vote reversed a conviction of attempted rape. It held that the circuit court erred in overruling defendant's motions to quash the indictment and the venire on the ground of systematic exclusion of Negroes from jury service by simply a token representation. The court said:

> We recognize that in some counties compliance with these constitutional requirements may present difficulties, but they must be surmounted if the criminal laws are to be effectively administered. The United States Constitution does not require proportional representation of the races on a jury, or even that members of a particular race must be on a particular jury. As a practical matter, what is required is that the county officials must see to it that jurors are in fact and in good faith selected without regard to race.[52]

Enforcement of the criminal laws requires that juries be selected without regard to race. This fact was implemented by a 1962 amendment to section 264 of the Mississippi Constitution. Before this amendment, a person could not be a juror unless he was a qualified elector and able to read and write. The amendment gives the legislature power to provide for determining qualifications of jurors. In some counties there are relatively few Negroes who are qualified electors.

Mississippi Laws 1962, chapter 308, provided that every male citizen

---

[50] *But cf.* Swain v. Alabama, 85 Sup. Ct. 824 (1965) (a case upholding struck jury system and peremptory challenges removing Negroes)

[51] 171 So. 2d 129 (Miss. 1965).

[52] *Id.* at 134.

not under 21 years, "who is either a qualified elector, or a resident freeholder of the county for more than one year," without stated convictions, "is a competent juror." The board of supervisors at its April meeting or later shall select and make a list of the persons to serve as jurors in circuit court for the next 12 months, "and as a guide in making a list they shall use the registration book of voters and the land assessment roll of the county," and shall select qualified persons of good intelligence, sound judgment, and fair character. This 1962 statute enabled preparation of jury lists consisting of qualified electors and resident freeholders. Selection of juries which would withstand constitutional tests was thus facilitated.

However, in 1964 the legislature created considerable ambiguity and difficulty in this area by enacting chapters 326 and 327, Laws of 1964. Section 1 of chapter 308, Laws of 1962, was an amendment to code section 1762, and provided that either qualified electors or resident freeholders could be competent jurors. The 1964 Laws did not expressly, and perhaps not impliedly, repeal that provision of the 1962 act. However, chapter 326, Laws of 1964, provided that it amended code section 1766, to eliminate use of the land assessment roll as a guide for the board of supervisors in making the list.

Chapter 327, Laws of 1964 then put the responsibility upon the circuit judge, by "supplemental authority," to enter an order determining in his discretion that resident freeholders, though not qualified electors, should constitute competent jurors along with qualified electors, and thereafter the board of supervisors shall utilize both the registration book of voters and the land assessment roll in selecting lists of jurors. Section 4 of chapter 327, Laws of 1964, purports to limit this authority of the circuit judge, stating it shall be exercised "only on and after" a date when persons who are resident freeholders are eliminated "by amendment or otherwise as qualified or competent jurors" under the 1962 Laws. I do not know what section 4 means, or its purpose. But a fair interpretation of the 1964 law is that, in addition to qualified electors, resident freeholders may serve as competent jurors if the circuit judge has entered an order to that effect. Then the board of supervisors has the duty of selecting lists of jurors from both the lists of qualified electors and resident freeholders. In short, the 1964 statutes place the responsibility upon the circuit judge to see that, in those counties where boards of supervisors have not selected juries without regard to race, an order is entered authorizing the use of resident freeholders as well as qualified electors as jurors.

The significance of this power of circuit judges is that, in counties facing this difficulty, the trial courts have the responsibility to see that juries are selected which can effectively decide criminal cases, and that "county officials must see to it that jurors are in fact and in

good faith selected without regard to race."[53] Another facility available to trial judges to effectuate the summoning of valid grand and petit juries is the power to quash a venire if the board of supervisors has not selected the list of jurors in accordance with statutory and constitutional requirements. It would be a vain and foolish thing to permit the time and expense of trying criminal cases with juries which manifestly have not been selected in accordance with the requirements of law.

Moreover, in 1965, the First Extraordinary Session of the Mississippi Legislature may have simplified considerably the ways to obtain non-discriminatory selection of jurors and previous distinctions between qualified electors and resident freeholders as candidates for jury service. The legislature, by the enactment of ten statutes,[54] reduced the requirements for becoming a qualified elector, and thus greatly enlarged the number of those available for jury service as qualified electors.

Applicants for registration as voters are now required to answer six simple questions including name, date of birth, citizenship, residence, and conviction of stated disqualifying crimes.[55] A person who cannot read and write cannot qualify to register.[56] Since voting is a separate act from that of registration, another statute sets out the new reduced qualifications for the right to vote. It does not add qualifications in addition to those required for registration, requiring only that a voter must be an inhabitant of this state, with exceptions, a citizen of the United States, twenty-one years of age, residing in this state for two years and one year in the election district, able to read and write, duly registered as an elector, never convicted of five stated felonies, and payment of poll taxes.[57] Other acts repeal existing statutes concerning qualified electors.[58] On August 17, 1965, proposed constitutional amendments to then existing voting restrictions were submitted and approved.[59] These amendments conform the state constitution to the statutes enacted by the 1965 session.

In the present context, the significance of this legislation is to increase substanially the number of qualified electors available for jury service, and to minimize the previously important distinction between qualified electors and resident freeholders.

V. Post-Conviction Remedies

The due process clause of the fourteenth amendment requires a state to provide adequate post-conviction remedies for those convicted

[53] *Ibid.*

[54] Miss. Laws 1965, First Extra. Sess., S.B. 1501-10.

[55] Miss. Laws 1965, First Extra. Sess., S.B. 1501.

[56] Miss. Laws 1965, First Extra. Sess., S.B. 1502.

[57] Miss. Laws 1965, First Extra. Sess., S.B. 1506.

[58] Miss. Laws 1965, First Extra. Sess., S.B. 1507-10; See also Miss. Laws 1965, First Extra. Sess., 1503-05.

[59] Miss. Laws 1965, First Extra. Sess., S.C.R. No. 103.

of crimes.[60] The United States Supreme Court has re-emphasized the rule that the federal courts should not entertain petitions for habeas corpus of state prisoners, until state remedies have been exhausted; but it has also strengthened its rule that it is mandatory for federal district courts to provide an evidentiary hearing on habeas corpus petitions, if the petitioner has not received a full and fair evidentiary hearing in a state court either at the time of trial or in collateral proceedings.[61] Thus, it is clear that claims of convicted persons will increasingly be tried in the federal district courts, unless the state courts have a system of post-conviction review which permits the convicted person to make his claims heard.

Mississippi has a simple and direct method for post-conviction review, which provides for a full and fair evidentiary hearing, thus permitting the convicted person to make his claims and be heard on them.[62]

Since 1952, where a judgment of conviction has been affirmed on appeal by the Supreme Court of Mississippi, no petition for a new trial or a writ of error coram nobis is allowed to be filed in the trial court unless and until a petition has been presented to the supreme court for an order allowing its filing. This statute applies only where a judgment of conviction has been affirmed.[63] There is a long line of decisions under this statute by the supreme court, interpreting and applying it.

In the recent case of *In re Broom's Petition*,[64] the supreme court held that, where a conviction had not been affirmed, and the time for appeal had expired, the petitioner had a clear remedy, stating:

> The appropriate procedure would be by a simple motion in the court which imposed the sentence to vacate, set aside, or correct the sentence, and to order a new trial; or alternatively, by a petition in the trial court for a writ of error coram nobis for similar relief. The former is simpler, but the latter is available also, and in practice the virtual equivalent. Code section 1992.5(1) recognizes both. In either event, the sentencing court, familiar with preceding facts, would hear the motion or petition and evidence, and dispose of it as the facts indicate.[65] In summary, excepting those cases to which coram nobis under section 1992.5 is applicable, a prisoner in custody of the state, claiming the right to be released or to a new trial upon the ground that his sentence was imposed in violation of the Constitution of the United States or the State of Mississippi, or that the

[60]Douglas v. California, 372 U.S. 352 (1963); Griffin v. Ilinois, 351 U.S. 12 (1956).

[61]See Fay v. Noia, 372 U.S. 391 (1963).

[62]Miss. Code Ann. § 1992.5 (1956).

[63]*Ibid.*

[64]168 So. 2d 44 (Miss. 1964).

[65]*Id.* at 47.

> court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence and grant a new trial, or may file a petition of like nature for a writ or error coram nobis for similar relief. Under the procedures long recognized in this state, the sentencing court after hearing may determine the issues and make findings of fact and conclusions of law with respect to them.[66]

This simple motion procedure, where the conviction has not been affirmed, applies to newly discovered evidnce and "is also available to correct an infringement of the constitutional rights of an accused." Substantially, it is based upon earlier precedents of this court, and the recently promulgated rule of the Supreme Court of Florida.[67]

One unresolved question, pertaining to a motion for new trial as a post-conviction remedy under *Broom*, is whether it may be heard and decided in vacation. Circuit courts in many counties sit for only a few weeks twice a year. It would seem desirable and fair that a convicted person should have a reasonably prompt hearing, since he is serving a sentence during the period in question. A specific statute authorizing trial courts to hear these matters in vacation would be the preferable and definite way to establish that power in the trial court. With no statute on this vacation power, counsel might consider whether section 1657 of the Mississippi code would apply. It gives circuit courts power to issue extraordinary writs, which would include coram nobis, in term time and in vacation. Since the motion and coram nobis procedures are essentially the same, as was held in *Broom*, the issuance of the writ or order, it might be contended, is the equivalent of the vacation power authorized in section 1657.[68] Also, in 1962, code section 1519 was amended to provide: "On motion of either party and written notice for ten days to the attorney of record for the opposing party or parties all demurrers and motions may be determined in vacation, in the discretion of the court . . ." There may be some merit in the view that this vacation authority to consider motions would apply to a motion for new trial in a post-conviction remedy under *Broom*.

Other than this apparent deficiency, it would appear that Mississippi has adequate post-conviction methods for a full and fair evidentiary hearing, in full compliance with the requirements of due process.

VI. Prejudicial Pretrial Publicity

It is a difficult problem to protect the right of fair trial against publicity which may prejudice, inflame, or influence the jury. This is

---

[66] *Id.* at 48.

[67] Fla. Crim. Proc. R.1.

[68] *Cf.* Miss. Code Ann. § 1523 (1956).

because we are dealing with two important rights, the right to a fair trial of an accused, and the right of a free press, both of which must be preserved and strengthened. The task is to strike a sensible balance.

The Warren Commission recommended that the press and other news media and the bar cooperate in establishing "ethical standards concerning the collection and presentation of information to the public so there will be no interference with . . . fair trial." The American Bar Association has appointed a Committee on Fair Trial and Free Press to examine particularly the role of law enforcement officials, lawyers, and the courts. The main source of prejudicial information originates within the legal process, from police, court attendant, prosecuting, and defense attorneys. The Supreme Court of New Jersey has adopted, perhaps, a rule which is too broad. It bans lawyers' statements concerning confessions, the defendant's probable guilt, and his prior record. This interpretation of two of its Canons of Professional Ethics came in an opinion refusing to reverse a murder conviction in which defendant claimed that his motions for mistrial should have been allowed because of prejudicial newspaper publicity.[69] The court said that statements by prosecutors and lawyer staff members as to alleged confessions by accused or to the effect that the case is open and shut, or with reference to the defendant's prior criminal record have the capacity to interfere with a fair trial and cannot be countenanced. It further stated that police, who are not members of the bar, should be subject to discipline at the hand of the proper police authorities.

However, as pointed out by Lewis F. Powell, Jr., President of the American Bar Association, "action by the legal profession will necessarily remain a partial solution only without cooperation from the news media, as prejudicial publicity may come from sources not controllable by the bar or the courts."[70]

Irvin v. Dowd,[71] is an illustration of the highly prejudicial publicity before trial by newspapers, radio, and television stations, which required the court to reverse a murder conviction. These media blanketed the county in Indiana with defendant's lineup identification, lie detector tests, six murders, confessions to the six murders, defendant's offer to plead guilty if promised a 99-year sentence, and defendant's confession of 24 robberies. The court recognized that jurors are not required to be totally ignorant of the facts and issues involved, but should be able to lay aside their impressions and render a verdict based on the evidence presented in court. It found a pattern of deep and bitter prejudice throughout the community. The finding of impartiality did not meet constitutional standards. The court said: "With his life at

---

[69]New Jersey v. Van Duyne, 43 N.J. 369, A.2d 841 (1964).

[70]51 A.B.A.J. 199 (1965).

[71]366 U.S. 717 (1961).

stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a waive of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt."[72]

In *Rideau v. Louisiana*,[73] a conviction of murder from Louisiana was reversed, where television stations in the community broadcast a sound film of defendant in the presence of the sheriff and state troopers admitting to a robbery, kidnapping, and murder. This was carried out with the active cooperation and participation of local law enforcement officers. It was error to deny a change of venue.

Sheppard v. Maxwell,[74] was the habeas corpus proceeding by Dr. Samuel H. Sheppard, a Cleveland osteopath, who was convicted of murdering his attractive wife. This was a particularly extreme example of highly inflammatory and prejudicial publicity saturating not only the entire community, but the entire nation. The district court found five separate violations of petitioner's constitutional rights, set aside his conviction, and ordered Sheppard released on bond pending his appearance for a new trial before the state court.

Where widespread publicity and coverage by television, radio, and news media of a trial exists, the conviction may be reversed because there is such a probability that prejudice will result that the trial is deemed inherently lacking in due process. A showing of actual prejudice is not a prerequisite. This was the holding in *Estes v. Texas*.[75] A much publicized financier was convicted in a Texas court of the offense of swindling, after a trial of national notoriety which was televised and broadcast over his objections. A majority of the Court held that, in view of the great notoriety, due process of law was denied the accused by televising and broadcasting of proceedings. These incidents occurred during a pretrial hearing and on the merits, although much of the latter was not broadcast live, but by video tape. The sixth amendment guarantees the accused a public trial, which contemplates that he will be fairly dealt with and not unjustly condemned. This includes an atmosphere essential to the preservation of a fair trial. Television in its present state, Judge Clark said, injects an irrelevant factor into court proceedings. The Court observed it was not dealing with future developments in the field of electronics, but with the facts as they appeared in the *Estes* record.[76]

---

[72]*Id.* at 728; See Janko v. United States, 366 U.S. 716 (1961), reversing 281 F.2d 156 (8th Cir. 1960); Marshall v. United States, 360 U.S. 310 (1959); United States v. Milanovich, 303 F.2d 626 (4th Cir. 1962); State v. Thompson, 266 Minn. 385, 123 N.W.2d 378 (1963).

[73]373 U.S. 723 (1963).

[74]231 F. Supp. 37 (S.D. Ohio 1964).

[75]85 Sup. Ct. 1628 (1965).

[76]See Turner v. Louisiana, 379 U.S. 466 (1965).

The cherished right of free trial is guaranteed by the Constitution. The sixth amendment's guarantee of a public trial is for the benefit of the accused, not the public at large. It is designed to prevent secret trials and also to provide appropriate public scrutiny of the administration of justice. But a trial should in fact be fair and in accordance with law. Hence the problem of the bar and of the press and other news media is a common one, requiring thoughtful and reasoned solutions in the public interest.

All of these recent developments represent a revolution in criminal justice. For good or ill, their significance lies in a thrust toward an unattainable equal and exact justice. As Mr. Justice Felix Frankfurter once said: "The history of liberty has largely been the history of the observance of procedural safeguards."

A HISTORICAL SKETCH OF THE EARLY LAW SCHOOL OF THE UNIVERSITY OF MISSISSIPPI: A NEWLY FOUND MEMOIR

Sylvester John Hemleben and Richard T. Bennett***

What appears to be the only memoir giving an account of the early days of the Law School of the University of Mississippi has recently been called to the present writers' attention.[1] The work is entitled RISE AND PROGRESS OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF GOVERNMENTAL SCIENCE AND LAW, and was written by Charles Bowen Howry. It consists of 37 typewritten pages, double-spaced. The work was written with publication in mind and was prepared upon official request,[2] the exact nature of which request is not made known. The author speaks of his work as being designed as "an authentic historical sketch."[3] The manuscript bears the signature of the author,[4] but no date for its writing is given. The work is undocumented. The author of this historical sketch of the early Law School states that he "will deal with so professional a subject in his own way as a lawyer naturally would."[5] The work was meant not to be exclusively an account of the early department of law; other departments of the university as well as the origins of the university itself are given consideration. The author is conscious of possible failings in organization of subject matter, and he speaks of "disconnected"[6] materials and "some uneveness"[7] in the method of narration, but he feels that sometimes such drawbacks contribute to genuiness and spontaneity.[8] His presentation must necessarily be one that is personal to him, or as he expressed it, "As no one can teach another just how to write because all composition must depend on circumstances and be the result of one's own thought, we can readily see that the freedom of authorship is obviously what

*Associate Professor of Law, University of Mississippi.

**Henley, Jones and Henley, Jackson, Mississippi.

[1]The document was located in old files in the School of Law, University of Mississippi, by Mrs. Grace B. Brown, Registrar in the School of Law, who made the treatise available to the authors of this study on Howry in October, 1964. The original manuscript has been placed in the Rare Book Collection of the Law School Library, University of Mississippi.

[2]HOWRY, RISE AND PROGRESS OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF GOVERNMENTAL SCIENCE AND LAW 1 [hereinafter cited as HOWRY].

[3]*Ibid.*

[4]*Id.* at 37.

[5]*Id.* at 1.

[6]*Id.* at 24.

[7]*Id.* at 1.

[8]*Ibid.*

it ought to be, even though there be an intent to reflect too much personality."[9] At any rate, he believes his account will "be interesting and perhaps prove useful."[10]

The work was undertaken by Howry as a work of love. The University of Mississippi, he proudly claims, had for long ranked with the first institutions of its kind in the country, and he had for it the same kind of affection that Webster had for Dartmouth. Howry writes, "Has anyone ever known a student at this university who had anything but love and veneration and hope for its success?"[11] The University returned the affection, and in 1928-1929 a men's residence hall was erected in his honor.[12]

Charles Bowen Howry was born in Oxford, Mississippi, May 14, 1844. He was the son of James M. and Narcissa Brown Howry.[13] His father, who had located in Oxford in 1836, had been elected to the circuit bench in 1841,[14] and upon the establishment of the University of Mississippi Judge Howry was appointed one of the trustees.[15] The son's education at the University of Mississippi was interrupted by the Civil War. Charles Bowen Howry served as private, second and first lieutenant, 29th Mississippi Infantry, C.S.A., was in the battle of Chickamauga and eight other battles and numerous skirmishes. He was severely wounded in the Battle of Franklin.[16] He returned to the University after the War, to become the only Senior registered in law, 1866-1867, and the sole graduate in law in 1867 receiving the LL.B. degree.[17] After graduation, he practiced law in Oxford, Mississippi, from 1867 to 1874 and again from 1878 to 1893. He was a member of the state House of Representatives, 1880 to 1884, and was United States District Attorney, 1885 to 1889. He served as a trustee of his alma mater from 1882 to 1894. He was Assistant Attorney General of the United States, 1893 to 1897, and a member of the Democratic National Committee, 1891 to 1896. From 1897 to 1915 he was an Associate Judge,

---

[9] *Ibid.*

[10] *Ibid.*

[11] *Id.* at 2.

[12] The tablet on the building contains a misspelling of the name. The inscription reads "Charles Bowman Howry Hall" instead of Charles Bowen Howry. The Law School has honored him by placing his portrait in one of its classrooms.

[13] 14 WHO'S WHO IN AMERICA 1003 (1926-1927).

[14] LYNCH, THE BENCH AND BAR OF MISSISSIPPI 512 (1881).

[15] *Id.* at 514.

[16] 14 WHO'S WHO IN AMERICA 1003 (1926-1927).

[17] Alphabetical Index of Students, HISTORICAL CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI, 1849-1909 368 (1910). That there was only one graduate in law for the year is confirmed in a table of degrees conferred for 1867. *Id.* at 337. In 1896 the University of Mississippi was to confer on him the LL.D. degree. 14 WHO'S WHO IN AMERICA 1003 (1926-1927); HISTORICAL CATALOGUE OF THE UNIVERSITY OF MISSISSIPPI, 1849-1909 106 (1910).

United States Court of Claims.[18] During these years in Washington, he indicated that he was so busy that he was unable to pay much attention to the course of litigation in his home state.[19] He resigned in 1915,[20] and resumed consulting practice in Washington.[21] He was married three times and had seven children.[22] He died in 1928, and was buried in Oxford, Mississippi.[23]

Before turning his attention to the Law School proper, Howry analyzes at some length the origins of the University which he finds in federal aid.[24] He begins his discussion with a treatment of the Northwest Ordinance of 1787 which he declares was a far-seeing, wise measure designed to spread general knowledge and good citizenship in the area to which the Ordinance applied. The Ordinance was a declaration that education should be forever fostered. In consistency, all states were to have the benefits of land grants to encourage education. Two years after Mississippi was admitted to the Union, Congress made a grant of a township from the public domain for the establishment of "a seminary of learning."[25] Title to the land was vested in the legislature in trust, and 35½ of the 36 sections were sold in 1833.[26] Jefferson College,[27] a nonstate institution, incorporated by the territorial legislature in 1802, and to which school Congress had made a grant of land in 1803, had begun to languish. Howry says that its resources had not been applied properly, and its funds had been squandered.[28] The legislature could not secure the land granted to the private institution, and the authorities of Jefferson College refused to surrender control of the charter to the state.[29] The legislature then turned its attention elsewhere for the founding of an institution of higher learning in the state.

---

[18]14 WHO'S WHO IN AMERICA 1003 (1926-1927).

[19]HOWRY, 32 b, 34.

[20]See THE BENCH AND BAR OF THE UNITED STATES COURT OF CLAIMS TO JUDGE CHARLES B. HOWRY ON HIS RETIREMENT, MARCH 15, 1915 (1915). "Judge Howry has always displayed marked learning in the law." Wiliam B. King, *Id.* at 5.

[21]14 WHO'S WHO IN AMERICA 1003 (1926-1927).

[22]*Ibid.*

[23]The dates on the tombstone in Saint Peter's Cemetery are 1844-1928. For further biographical information, see 9 DICTIONARY OF AMERICAN BIOGRAPHY 315 [hereinafter cited as D.A.B.].

[24]HOWRY, 4.

[25]*Id.* at 5.

[26]*Ibid.*

[27]See THE CHARTER AND STATUTES OF JEFFERSON COLLEGE, WASHINGTON, MISSISSIPPI, AS REVISED AND AMENDED TOGETHER WITH A HISTORICAL SKETCH OF THE INSTITUTION FROM ITS ESTABLISHMENT TO THE PRESENT TIME (1840). For an account of Jefferson College, see MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 25-37 (1899).

[28]HOWRY, 4.

[29]*Id.* at 7-8.

Commissioners were appointed to receive proposals for the location of a university.[30] The citizens of Lafayette County donated a section of land, and Oxford was thus selected as the seat of the new institution of learning.[31] Howry was concerned with the indebtedness arising out of the University or Seminary Fund.[32] John N. Waddel who was Chancellor of the University, 1865-1874, pointedly stated that the university was not endowed by the state, but its endowment was furnished by the Congress of the United States. "The State, by its Legislature, is declared to be hereby the trustee of the fund. It was accepted on the condition that it was to be managed for the benefit of a seminary of learning. Coming to the facts of history it appears that not even the interest has been paid."[33] In 1880, Howry took a part in securing a legislative settlement in the form of appropriations.[34] Whether the authorities of the institution ever accepted the settlement or not, Howry did not determine.[35]

The original board of trustees of the University of Mississippi at the time of its founding comprised: J. Alexander Ventress, John Anthony Quitman, William L. Sharkey, Edward C. Wilkinson, Francis L. Hawkes, Alexander H. Pegues, William Y. Gholson, Alexander M. Clayton, Jacob Thompson, Pryor Lea, James M. Howry, John N. Waddel, and John J. McCaughan. In the opinion of Charles Bowen Howry, these men were "among the most distinguished citizens of Mississippi."[36]

Ventress, Howry points out, has the distinction of being the author of the act organizing the university.[37] His early education was obtained in Wilkinson County. He then attended the University of Edinburgh, the Academy of Paris, and the University of Berlin. He served on the board of trustees for 23 years.[38] Of his father, James M. Howry, the author points to an even longer period of service, 26 years. The tribute of the son to the father reads: "From 1844 to 1870 this devoted friend of the university gave freely of his time and talents in untiring efforts

---

[30] *Id.* at 5.

[31] *Ibid.* The University was located in Oxford by a majority of one vote. MEMORIALS OF ACADEMIC LIFE BEING AN HISTORICAL SKETCH OF THE WADDEL FAMILY IDENTIFIED THROUGH THREE GENERATIONS WITH THE HISTORY OF THE HIGHER EDUCATION IN THE SOUTH AND SOUTHWEST 260 (1891) [hereinafter cited as WADDEL, MEMORIALS OF ACADEMIC LIFE THROUGH THREE GENERATIONS].

[32] HOWRY, 6-7.

[33] WADDEL, MEMORIALS OF ACADEMIC LIFE THROUGH THREE GENERATIONS 297.

[34] HOWRY, 7.

[35] *Ibid.*

[36] *Id.* at 5. Cabaniss speaks of the original Trustees as "thirteen of the most eminent men of the state." CABANISS, A HISTORY OF THE UNIVERSITY OF MISSISSIPPI 6 (1949) [hereinafter cited as CABANISS].

[37] *Ibid.*

[38] *Ibid.*

to advance the interests of the institution."[39] Quitman became governor, and was a major general in the War with Mexico. Howry writes of him, "His public history is known to fame and he will live as faithful to every trust and as one of those northern men who was long a favorite of our people and who in turn [sic] was beloved by them."[40] Sharkey was 19 years on the state Appellate Court bench. Howry says, "He has written his history in decisions that will rank with those of the famous jurists of the United States."[41] Wilkinson was a distinguished lawyer and a prominent member of the board.[42] Gholson moved to Cincinnati, after a successful career in Mississippi.[43] Thompson was in Congress for 16 years, served as Secretary of the Interior for four years, and in the words of the writer of this historical essay, "He was a man of wide influence and left his impress, not only upon the page of University history, but also upon the political fortunes of Mississippi."[44] Clayton served on the Appellate bench and as Circuit Judge. He was "a man of great learning and one of the ablest jurists the State ever had."[45] McCaughan, in the words of the author, was "one of the first citizens . . . of the State."[46] Lea, a lawyer of high character and ability, served but two years.[47] Of Waddel, the author says that he "was one of the faithful whose services were needed at a critical period in the history of the institution."[48]

The academic department of the new University of Mississippi had, in the words of Howry, "a small corps of able and eminent instructors."[49] The first president was George Frederick Holmes, an Englishman by birth, who gave instruction in Metaphysics, Ethics, and Political Economy.[50] He came from William and Mary College, and served but one year on account of ill health.[51] Doctor Holmes afterwards served "with great distinction"[52] at the University of Virginia.

---

[39] *Id.* at 5-6.

[40] *Id.* at 6.

[41] *Ibid.* After the Civil War Sharkey became professional governor of the state upon appointment of President Andrew Johnson. See Meador, *Lamar and the Law at the University of Mississippi*, 34 Miss. L.J. 227, 230-31 (1963) [hereinafter cited as Meador].

[42] Howry, 6.

[43] *Ibid.*

[44] *Ibid.* See note 128 *infra*.

[45] *Id.* at 6.

[46] *Ibid.*

[47] *Ibid.*

[48] *Ibid.*

[49] *Id.* at 8.

[50] *Ibid.*

[51] *Id.* at 8-9. While Howry gives one year as the tenure of the first president, Holmes actually served only from July, 1848 to March, 1849. For the strange circumstances of his leaving the University, see Cabaniss, 22-23.

[52] *Id.* at 9.

Augustus B. Longstreet was Holmes' successor and served from 1849 to 1856. He came from Georgia with a reputation for many accomplishments as a theologian, writer, lawyer, and judge.[53] Howry extols him as having "a remarkable career,"[54] a president who was genial, adaptable, efficient, and popular. During his seven years as head of the institution he made "a great record."[55] Doctor Longstreet was a contributor to the first newspaper published in Oxford after the Civil War.[56] He is described as rich in humor and as having written an "inimitable collection of stories"[57] entitled GEORGIA SCENES.[58] According to the writer of the historical sketch of the Law School: "In the last years of his life he seemed to have regretted indulgence in the humor of that book and searched for every copy extant in order to destroy what he had written."[59] Howry engaged in what he considered a bit of humor in this regard, and went out to the doctor's home on horseback to ask him to save a copy of the humorous book for him. Instead of replying, the doctor admired his visitor's horse and asked why he was called "Bullet." It would seem that no explanation was forthcoming, in that President Longstreet was called "Old Bullet" by the students, and the horse was for the occasion named after him.[60]

Professor John N. Waddel, another member of the faculty, was "a master"[61] in languages and "seemed born to the classroom."[62] In addition to being a linguist and professor, he was a minister.[63] He became

---

[53]Longstreet held the degree of Bachelor of Laws. He was also a clergyman. For his works in theology see LETTERS ON THE EPISTLE OF PAUL TO PHILEMON ON THE CONNECTION OF APOSTOLICAL CHRISTIANITY WITH SLAVERY (1845); FIRST DAY SERMON DELIVERED IN THE WASHINGTON STREET METHODIST EPISCOPAL CHURCH (1861). See also ALTSCHUL, AUGUSTUS BALDWIN LONGSTREET MANNERS AND MORALS IN SOUTHWESTERN FOLK HUMOR (1960?) [Unpublished M.A. thesis, Columbia University].

[54]HOWRY, 9.

[55]*Ibid.*

[56]*Ibid.*

[57]*Ibid.*

[58]GEORGIA SCENES: CHARACTERS, INCIDENTS, ETC. IN THE FIRST HALF CENTURY OF THE REPUBLIC (1840).

[59]HOWRY, 9.

[60]*Ibid.* For further biographical information on Longstreet: WADE, AUGUSTUS BALDWIN LONGSTREET, A STUDY OF THE DEVELOPMENT OF CULTURE IN THE SOUTH (1924); FITZGERALD, JUDGE LONGSTREET: A LIFE SKETCH (1891).

[61]*Ibid.*

[62]*Ibid.* Waddel said that he made a resolution never to appear before a class without having thoroughly mastered the subject beforehand. He felt that this exerted a wholesome influence over his career as a teacher. To this he attributed the fact that he accomplished a greater amount of good for himself and others in the profession of teaching than he could in any other field. WADDEL, MEMORIALS OF ACADEMIC LIFE THROUGH THREE GENERATIONS 189.

[63]Of interest is WADDEL, THE EVILS OF UNSANCTIFIED AMBITION!! (1870).

Chancellor of the University and served from 1865 to 1874.[64] He left a summary of his career in MEMORIALS OF ACADEMIC LIFE THROUGH THREE GENERATIONS.[65] Howry adds "The institution was never served more faithfully than by him."[66]

Another member of the faculty was a medical doctor, John Millington, Professor of Natural Philosophy and Chemistry, who came from William and Mary College and was highly regarded for his learning in his fields.[67] Howry had little further knowledge or recollection of his career.[68]

Albert Taylor Bledsoe, the Professor of Mathematics and Astronomy, was a lawyer. A Kentuckian, he was a graduate of West Point Military Academy and had settled early in life in Springfield, Illinois.[69] As a lawyer he knew Abraham Lincoln on the circuit in Illinois.[70] Howry was greatly interested in the experiences related to him in 1877 by this companion of Lincoln. Bledsoe always spoke highly of Lincoln.[71] Howry's own estimate of Bledsoe is that he was "one of the most brilliant intellects in the period of his time."[72] Howry knew him from early childhood when the professor was a "constant visitor in the home."[73] Bledsoe and the writer's father were most intimate friends.[74] The author of several books, he became noted in particular for his work, IS DAVIS A TRAITOR,[75] a book in defense of secession.[76] He was a man of great versatility and attracted attention as a mathematician, lawyer, scholar, publicist, philosopher, and writer.[77] At the time of his death, he was

---

[64]The title of President had been changed in 1859 to that of Chancelor. According to Howry, Waddel retired from the University "around 1873." HOWRY, 9. The exact date was July, 1874.

[65]*Ibid.* WADDEL, MEMORIALS OF ACADEMIC LIFE THROUGH THREE GENERATIONS recounts his family's service to education for generations, first through Moses Waddel, then Wiliam Henry Waddel and then himself.

[66]HOWRY, 9.

[67]*Ibid.* See MILLINGTON, ELEMENTS OF CIVIL ENGINEERING (1839).

[68]HOWRY, 9. For a biography of Millington, see GLADDEN, JOHN MILLINGTON, A STUDY (1933).

[69]HOWRY, 10.

[70]*Ibid.*

[71]*Ibid.*

[72]*Ibid.*

[73]*Ibid.*

[74]*Ibid.* Bledsoe served for several months in 1849 as Acting President of the University.

[75]*Ibid.* The full title of the work is IS DAVIS A TRAITOR; OR WAS SECESSION A CONSTITUTIONAL RIGHT PREVIOUS TO THE WAR OF 1861? (1866). See also Bledsoe: AN ESSAY ON LIBERTY AND SLAVERY (1856); LIBERTY AND SLAVERY IN THE LIGHT OF MORAL AND POLITICAL PHILOSOPHY in ELLIOTT, COTTON IS KING AND PRO-SLAVERY ARGUMENTS (1860).

[76]HOWRY, 10. Howry says "necessarily the book was in defense of Secession." *Ibid.*

[77]*Ibid.*

the editor of the SOUTHERN QUARTERLY REVIEW in Baltimore, where he made his home.[78]

Howry offers an analytical presentation of what he holds to be the historical causes of the establishment of the Law Department at the University of Mississippi. With something of a defensive attitude the writer admits in one breath that there "is no necessary connection"[79] between his presentation and strict historical data, but in the next breath states that "There is, however, correlation enough to imply the conception of the mutual or reciprocal relation of the direct and indirect matter offered as part of a whole appropriate subject."[80] As if to ward off critics who might be in disagreement with his understanding of why the Law School came to be established, the author states flatly that "Whether interrelated or not,"[81] he intends to carry out his purpose and present the relations as he sees them.[82]

The writer lists the "substantial aid"[83] of the bar as of first significance in bringing about the establishment of the School of Law. It was the character and the influence of the bar that gave cordial aid to the Board of Trustees in their work of inaugurating the Law Department.[84] Without the zeal and interest of the profession it is to be doubted that a department of law would have been established for another generation.[85] The very composition of the Board of Trustees was an influential factor in securing endorsement of the idea that Mississippi should have its own school of law. There were several able lawyers on the board.[86]

A large number of Southern young men attended law school at the University of Virginia, attracted by the excellence of its offerings. The author states that Virginia had established "the great reputation"[87] of its law school which overshadowed in prestige its academic department, excellent as it was. The writer attributes the prestige of the law school to its faculty of eminent reputation.[88] He remarks that it can be "said unhesitatingly that the character and ability of the law instructors there influenced many parents in the south to select that institution above all others for the education of their sons in the law."[89]

---

[78] *Ibid.* For a sketch of Bledsoe, see CABANISS, 15-16.

[79] HOWRY, 13.

[80] *Ibid.*

[81] *Ibid.*

[82] *Ibid.*

[83] *Id.* at 14.

[84] *Ibid.*

[85] *Id.* at 24. Howry relies on Judge Clayton's opinion in this matter. Judge Clayton may be identified as Alexander M. Clayton. See note 147 *infra.*

[86] *Id.* at 10.

[87] *Id.* at 11.

[88] *Ibid.*

[89] *Ibid.*

Thus, quite a number of Mississippians went to the University of Virginia for their legal training, and it was a matter of regret to the Board of Trustees of the University of Mississippi that there was no law school within the state. With the support of the legal profession in the state,[90] the Board, therefore, espoused the cause of a law school for Mississippi.[91] The Board was in advance of the general sentiment in the State, but "be it said to the credit of the bar of the state at that time that many of its most influential members lent their aid in seeing the school established."[92]

Credit to the bar of the day for its foresight and perspicacity in fostering the establishment of a law school is even more impressive when the character of the bar is examined in the light of the standards of a subsequent age, for this was a community of lawyers without many of the advantages of the learning of attorneys of a later time. Howry explains:

> It was the ability and resourcefulness of a bar with comparatively few books; a bar almost destitute of precedents, depending largely on the vast English system of the common law; a bar graduating in the hard school of experience and yet placing many of their number on the bench and in the public life of state and nation; a bar whose influence promoted the cause of education and advanced the learning of the academies to the professional school. It was a bar of counsellors who wrote their biographies in the history of their time and in the laws which their wisdom enabled them to secure. In building character for themselves in their day and generation they have given lasting renown to Mississippi and her people.[93]

It was the development of the system of state jurisprudence[94] which made possible the inauguration of a law school for Mississippi, a system which in the words of the essayist "so largely brought Mississippi

---

[90]For a study of the early legal profession in Mississippi, see Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi,* 36 MISS. L.J. 155 (1965).

[91]The author says that the establishment of the law school had the warm endorsement of the Board "from the beginning." HOWRY, 10.

[92]*Id.* at 11.

[93]*Id.* at 24-25.

[94]Hemleben and Bennett state: "The lawyers of the pioneer era contributed much to the development of law and justice in Mississippi. They laid the foundations of the legal structure of the state and, it may be said, that they laid it well . . . . What is truly significant is that with little legal training and often inadequate general education, so many attorneys of the day rose to the occasion, served their clients well and met the needs of their day. It must have been for many the overcoming of great educational handicaps. When one reads the decision given by the supreme court of the state and observes the legal learning and rhetoric in which the opinions are written, one is impressed with the abilities of the early judges." Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi,* 36 MISS. L.J. 155, 169 (1965).

into prominence as a community quite equal in the legal profession to any other state in the union."[95] This is Howry's second condition which, as he sees it, led to the rise of the Law Department. The development of jurisprudence in the state is considered by him as a *sine qua non* to the founding of a law school.

Thirdly, the author believes, the advantages of "a perfect knowledge"[96] of the state's early legal history[97] existed in Mississippi. It is through such knowledge, he holds, that future legislation can be improved.[98] Howry had a deep appreciation of the importance of legal history to every lawyer and as a part of the education of every student of law.[99] "Of all people of all the professions," he writes, "nothing is more important than for the lawyer to know something of the past history of the law. Not merely reminiscence, but the sources on which the learning of the law is derived. Such knowledge is a sure indication of the state and progress of society, and an aid to the effort to build on that which time may have proven to be good but rejecting that tried and found wanting."[100] The writer holds that every lawyer must trace the laws of his state from their beginnings through their results, good and bad, and in such undertaking the lawyer must go deep in his analysis "to obtain an understanding comprehensive enough to solve problems necessary to be determined."[101] The historical development of the jurisprudence of the state is to be appreciated by educated men if the state is to progress and attain the measure of civilization it should.[102]

Fourthly, the writer finds in the prevailing conditions in the state the necessary impelling force for the founding of a school of law. He points to the extensiveness of litigation which makes clear the advan-

---

[95]HOWRY, 14. The conclusion of Mississippi's equality in prominence is the legal profession to any other state did not appear to the writer of the paper to call for substantiation.

[96]*Ibid.*

[97]On the state's early legal history see Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi*, 36 MISS. L.J. 155 *passim* (1965).

[98]HOWRY, 14. For the relationship of the legal profession with legislation and state administration see, Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi*, 36 MISS. L.J. 155, *passim* (1965).

[99]HOWRY, 13.

[100]*Ibid.*

[101]*Ibid.* The writer looked to Lord Brougham as his authority. Henry Brougham, in the reign of William IV, became Lord Chancellor, but he has been termed a "mediocre lawyer" "vain and showy," but "a man of great force and eloquence." RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 271 (1936).

[102]HOWRY, 13. Judge Howry perhaps felt that an enlightened understanding of the legal history of the state could be best obtained by law school training. He seemed to believe that the state had reached such a point in its development of jurisprudence as to call for formal study, if the future was to advance on the basis of the past.

tages of familiarity with leading decisions.[103] A firm believer in the value of case study, the author states that "the early reading of a young lawyer of the decisions of the appellate court (purely for purposes of search for reasons) is an example of value in leading to a clearer understanding of the principles to apply."[104]

Judge Howry sees a division of the legal history of the state into two periods of time, both of which, however, illustrate "the character and extent of the most novel and extraordinary litigation in the annals of any American state,"[105] arising in controversies over titles to lands, the processes of alienation, the laws of descent and distribution, the limitation of estates, the law of Baron and Femme, and such other matters as were connected with the affairs of a pioneer people settling in an undeveloped country.[106]

The first period, according to the author, began with the establishment of the Territory in 1798 and continued until statehood in 1817. This period was characterized by controversies over grants by governments and individuals claiming under different sovereigns.[107] There was prolonged and prolific litigation and "a trail of doubt and perplexity over land titles,"[108] with grants made by Spain, Great Britain, Georgia, and the United States.[109]

Whether litigation over land grants made by different sovereignties led to an aroused interest in the field of international law in Mississippi, the author does not say. The direct relationship is not made, but the writer takes pains after a discussion of some problems involved in defining boundaries to pay tribute to the erudition of Judge Wiley P. Harris[110] in the area of international law. Howry lauds Harris' briefs on the nonintercourse laws and the rights of neutrals and belligerents as "models of learning and sound reasoning under the rules of Interna-

---

[103]*Id.* at 14.

[104]*Id.* at 22.

[105]*Id.* at 14. See also *Id.* at 14a. One aspiring lawyer entered Mississippi in the early days because, "Magnificient accounts came from that sunny land of cheering and exhilirating prospects of fussing, quarrelling, murdering, violations of contracts, and the whole catalogue of *crimen falsi*—in fine, of a flush tide of litigation." BALDWIN, THE FLUSH TIMES OF ALABAMA AND MISSISSIPPI 47 (1846).

[106]HOWRY, 14.

[107]*Ibid.*

[108]*Id.* at 15.

[109]*Id.* at 14a. Of this period Lynch wrote: "The richness and reputation of its lands, and the conflicting tenures by which they were held, arising from British, Spanish and Georgia claims; the effort of the early courts to reconcile the conflicting rules of the civil and common law in regard to alienation and descent; the establishment of banks of unlimited issue, and the consequent speculation and reactionary crises, produced a vast amount of litigation, that required and early attracted to the Mississippi Territory an unusual array of legal talent." LYNCH, THE BENCH AND BAR OF MISSISSIPPI 47 (1846).

[110]For a biographical sketch of Wiley P. Harris, see 8 D.A.B. 325.

tional Law."[111] Whether a relationship between litigation involving land titles confused by conflicting claims arising from grants being made by different sovereignties and an increase in interest in international law is definitely made in the work or not, such interest was manifest in Mississippi. That fact cannot go unnoticed. The first instruction at the University of Mississippi in the field of law, although not on a professional basis, was in a course in International Law. Before the opening of the Law School, as Howry points out, the head of the institution was assigned the duty of teaching International Law.[112] This was the first step in the curriculum toward the offering of law courses.

In this early period, the Common Law was in a dominant position, due to the fact that with the organization of the Territory judicial proceedings were required to be in accordance with the Common Law. Howry takes note of the criticism that the uncertainties of the Common Law in themselves led to many conflicts over titles of land.[113] One of the most eminent of Mississippi lawyers, Wiley P. Harris, according to Howry, saw the common law of real property as an artificial and complex system with its rules of acquisition and transmission of title without recognizing titles otherwise obtainable.[114] This does not mean that Harris was blind to the virtues of the Common Law or its contribution to liberty,[115] but Howry believes that Harris was impressed with "the inept use of the narrow and subtle rules of the common law."[116]

The second period of the early legal history of Mississippi according to the author's classification began about 1830 when the state commenced to legislate for and take over control of well-organized bodies of Indians.[117] He sets no limit to the termination of the period, but internal evidence points to 1845, for he says that in about that year the old practitioners were giving way to a new group and Mississippi was entering a new period, "a halcyon period which culminated some 15 years thereafter in war."[118] The period was marked by conflicts over titles to large areas of land which the United States had acquired from the Choctaw and Chickasaw nations.[119] The author gives consideration to federal treaties and legislation in regard to the Indians.[120] He

---

[111]HOWRY, 17. Howry was associated with Harris on the Board of Trustees of the University and states that he and other members were "amazed at the extent and depth of his wonderful researches." *Ibid.*

[112]*Id.* at 10.

[113]*Id.* at 16.

[114]*Ibid.*

[115]*Ibid.*

[116]*Ibid.*

[117]*Id.* at 17. There is an unaccountable break of 1817 to 1830 in Howry's division of state legal history.

[118]*Id.* at 21.

[119]*Id.* at 14.

[120]*Id.* at 18-19.

also considers the questionable state legislation,[121] which brought into controversy the constitutional federal authority over the tribes.[122] Howry holds that a statement in the Act of 1830 "was practically an admission that the legislation as to citizenship was questionable."[123] Troubles arose over sale of Indian lands to whites, disputes ensued between Indians over rights to lands and "the courts became crowded with cases of varying nature and kind."[124] The author writes: "Land hunters white and black as well as halfbreeds and speculators of various degrees in quest of fortune brought to the state a new orgy in the ventures incident to the opening of lands in a new country."[125] To the lawyers already practicing in the state, many newcomers arrived, and Mississippi became "a paradise"[126] for lawyers. Howry gives as an illustration the career of Joe Holt who came from Kentucky, made a fortune in ten years, it was believed, returned East and declared that he had accumulated enough to enjoy the fruits of his practice elsewhere.[127]

It was in response to a memorial of the Board of Trustees of the University[128] that the legislature established the Chair of Governmental Science and Law in 1854.[129] Howry hails this as "almost as notable an event in our state history as the initial steps taken six years before in the opening of the academic department."[130] He points out that the Board of Trustees "had to"[131] memoralize the legislature to accomplish the inauguration of the first professional classes. He adds that it took

---

[121] *Id.* at 17-18.

[122] *Id.* at 17.

[123] *Id.* at 18.

[124] *Id.* at 19. Some were possessory actions and some were actions in ejectment. *Ibid.*

[125] *Ibid.*

[126] *Id.* at 20. As an elucidation, one writer speaking of "the bonanza times" in Holly Springs, Mississippi, said: "To the land office flocked the newcomers, some of them grasping or litigious or troubled because the land changed hands faster than the records the surveyors tried to keep. In 1838, there were 1,200 cases on the docket of the March term of Circuit Court, mostly having to do with land claims. So began the bonanza times for the lawyers who in 1840 numbered forty, one for each ten white men of the population. In the end Holly Springs would be fortunate because of her lawyers, for they were men of education and breeding, with a will and the power to command. Greatly because of them, it would not know the roistering, brawling days that marked so much of the Southern frontier." CARTER, A PROUD STRUGGLE FOR GRACE: HOLLY SPRINGS, MISSISSIPPI, WHEELER (ed.), A VANISHING AMERICA: THE LIFE AND TIMES OF THE SMALL TOWN 57 (1964).

[127] HOWRY, 20.

[128] The memorial was presented by Jacob Thompson, a leading citizen of Oxford. The memorial is reprinted in MAYES, HISTORY OF EDUCATION IN MISSISSIPPI 142-43 (1899). For biographical materials, see CLAIBORNE, MISSISSIPPI AS A PROVINCE, TERRITORY, AND STATE 447-66 (1880); 18 D.A.B. 459.

[129] HOWRY, 11.

[130] *Ibid.*

[131] *Ibid.*

an act of the legislature[132] to amend the charter of the University to provide for the beginning of the law department,[133] and a second act of a succeeding legislature to afford an amendment to the charter to permit the election of another law professor.[134] The writer states that the establishment of the Law Department[135] was a practical advance both to the future administration of justice and efficiency in the halls of legislation.[136] He declares, "It was the beginning of what a university should be to justify the use of that name."[137] He refers to Waddel who made the statement that before the establishment of the law department it was a misnomer to call the institution a university.[138] Howry says that after Waddel became Chancellor he said, "The Literary and Scientific Department is really only a College. We have but a single feature that gives us a claim to the name of a University, and that is, the Professional School connected with it."[139]

William F. Stearns was the first professor of law. Howry calls him "the original builder of a real southern law school."[140] The author states that it was a source of great satisfaction to Stearns that his appointment met approval by the bar.[141] Stearns had resided in Mississippi since boyhood, had practiced law for twenty years, and was popular in Holly Springs where he made his home. He had many friends throughout the state.[142] The author credits him as being known far and wide as one of the best equity lawyers in Mississippi.[143] Stearns was reluctant to accept the teaching post; he had a flourishing

---

[132]*Mississippi Laws,* 1854, Ch. 56, "An Act to Create in the University of Mississippi a professorship of governmental science and law." This first appeared in the Code of 1857, § XI, 159. In 1857 the diploma privilege was given to the Law School in that a diploma from the Law School with the degree of LL.B. entitled the holder to a license to practice in all the courts of the state. Ch. IX, 151 (1857). This is § 8663 in Miss. Code Ann. (1942).

[133]Howry, 11.

[134]*Ibid.* It was in 1860 that the second Chair of Law was established. *Mississippi Laws,* Ch. CLXXX, 238-39 (Feb. 10, 1860).

[135]The first law class, 1854-55, numbered seven students. Mayes, History of Education in Mississippi 144 (1889). The report of Thompson to the legislature had called for the training of students not only in law but in history and international law. Meador, 227, 232-33. It is to be noted that the original Law Department of the University of Mississippi, in the Jeffersonian tradition of education, was not to offer a narrow practicioner's training but rather the broad study of governmental science and history together with law as a correlative whole. *Ibid.*

[136]Howry, 11. The author in an awkward expression states that this advance "afforded to the intelligence of the state's great satisfaction." *Ibid.*

[137]*Ibid.*

[138]*Id.* at 8.

[139]*Ibid.*

[140]*Id.* at 12.

[141]*Ibid.*

[142]*Ibid.*

[143]*Ibid.*

and lucrative practice, according to universal testimony at the time.[144] He had a reputation as "a great student,"[145] and he was largely a lawyer's lawyer in that much of his work grew out of consultations with lawyers on their cases.[146] Two members of the Board of Trustees seemed to feel it was necessary to go to his office in an attempt to persuade him to look upon the offer of the professorship favorably. They had some difficulty in obtaining his consent.[147]

Once having decided to accept the position of Professor of Law, Stearns threw himself into his new duties with great enthusiasm.[148] He maintained that law school students, being members of a professional school, should not be subject to rules of discipline imposed by the faculty upon students in other departments, but rather should be under a code of discipline of their own.[149] He believed that such a discipline, neither harsh nor severe, would always surround their later life "with its unseeing influence, thereby constraining obedience."[150] He held, too, that those who instructed the students could see more quickly "the higher duty of conserving the morals of the pupils."[151] At one time when he was absent from the campus, some trouble arose and there were complaints about some of the law students. Upon his return, he warmly espoused the cause of his young charges and insisted that the Law Professor have exclusive jurisdiction in the matter. This led to a change in regulations which provided that authority over law students would in the future be exercised only by the law professor and the Chancellor of the University.[152] The author of this historical sketch says that while he did not know Stearns for some time after he came to the University faculty and saw but little of him, he remembers quite well the incident that arose concerning the question of the discipline over law students.[153]

Professor Stearns was not without opposition. The editor of a

---

[144] *Ibid.*

[145] *Ibid.*

[146] *Ibid.*

[147] *Ibid.* This information was imparted to Howry by a Judge Clayton. The Judge Clayton who is referred to may be identified as Alexander M. Clayton. Since the information of the visit of the two Trustees of the University to Stearn's office was given to Howry by Clayton, it is safe to assume that one of the two Trustees was Clayton who had been made a trustee upon the establishment of the institution and continued to serve for many years. Howry acknowledges his indebtedness to Judge Clayton for much of the information he acquired of the early history of the state. *Ibid.* On Clayton, see LYNCH, THE BENCH AND BAR OF MISSISSIPPI, 500-510. (1881).

[148] HOWRY, 12.

[149] *Id.* at 12-13.

[150] *Id.* at 25.

[151] *Ibid.*

[152] *Id.* at 12-13.

[153] *Id.* at 12.

local newspaper made attacks on the law school, questioning the need for its existence. He wrote disparagingly of the "manufactory"[154] of lawyers. The attacks were so continuous and appeared so dangerous to the well-being of the school that friends of the institution persuaded Howard Falconer of Holly Springs to establish a rival paper in Oxford.[155] Howry adds that Falconer had been educated at the University and was "a gentleman of high character."[156] Both papers were discontinued during the Civil War.[157]

Professor Stearns addressed a circular letter to members of the bar of the state in which he declined to acknowledge that the criticism was in any way involved in personalities as there were not two lawyers in the state whom he could believe were personally hostile to him.[158] Claiming that the Law School had fully met the early, modest expectations of the bar, Stearns stated that the crisis of the existence of the school had passed and that the Law School would now go on to a brighter day with greater prosperity and a greater promise of usefulness in proportion to the opinion which the bar might entertain of it.[159] There were more than six hundred lawyers in the state at the time, but Stearns believed that many lacked information concerning the Law School and were not in a position to judge the character or value of the advantages offered a law school student.[160]

The circular submitted two propositions: that the advantages offered by professional schools of law were superior to the training which could be acquired in a lawyer's office, and that the Law School of the University of Mississippi presented greater advantages than any other law school for those students who planned to practice in Mississippi.[161] In response to the deeply rooted prejudice of educating lawyers outside the offices of practitioners, Stearns pointed out that law schools in England and on the continent had long proved the usefulness of such professional institutions. He saw in their very existence conclusive proof that they were needed.[162] To Stearns there were many reasons why legal education should be conducted through professional schools.[163] A law school provides the student with a library,

---

[154] *Id.* at 25.
[155] *Ibid.*
[156] *Ibid.*
[157] *Ibid.*
[158] *Id.* at 25-26.
[159] *Id.* at 26.
[160] *Ibid.*
[161] *Ibid.*
[162] *Ibid.*
[163] *For* a study of the general education and legal training of Mississippi lawyers prior to the establishment of the Law Department, see Hemleben and Bennett, *Beginnings of the Legal Profession in Mississippi,* 36 Miss. L.J. 155, 156-58 (1965).

and since law books are multiplying so fast only a rich man could afford a comparable library. The myriads of undigested cases only serve to perplex, mislead and confuse the student who is without clue or principle; he needs a guiding hand through the labyrinthian mazes. Mechanical skill, though it might be learned in the workshop of a practicing attorney, would be in awkward imitation, and innocence of thought would make mere formality of the treadmill. The professional school makes the student distinguish between the living law and the dead machinery through which it operates. Stearns held that theoretic teaching and theoretic knowledge, as obtained in a law school, should not follow, but rather should precede the practical application of scientific rules. The professor finds support for law school education in the very fact that lawyers who were compelled to instruct themselves lament the loss of precious hours and fruitless waste of youthful energy in their lack of formal training in the law. In the law school, the student can learn to apply understandingly legal principles to cases through moot court work. Stearns explains that the attorney is not, in a practical sense, in a position to offer proper instruction in his office to a young hopeful in the law. The practitioner by his very eminence in the profession is rendered incapable of giving instruction with undeviating regularity. The demands upon his time due to his professional engagements are large. The time he can devote to the advancement of his pupil is fitful and irregular. He must necessarily suspend examinations while court is in session or during his frequent absences from his office. Left to himself, the professor says, such a pupil does not learn the habit of regular and systematic study.[164] Stearns agrees with Coke that the student must be furnished the whole course and be a diligent observer of cases of law and engage in timely and orderly reading so that two things may be avoided—distorted reading and precipitate practice.[165]

Criticism of the Law School seemed to be effectually settled by about 1860. Professor Stearns believed that the crisis had passed and that the school had emerged from an experimental stage. He seemed to feel that the school was now on such a solid foundation that several applicants were advised to defer entrance into law school until they had met higher scholastic standards.[166]

To the second chair of law in the University of Mississippi, James F. Trotter was elected in 1860.[167] Howry calls him "a great addition to the university."[168] He had served as circuit judge, chancellor, and a

---

[164]Howry, 26-27.

[165]*Id.* at 27. On Coke and the use of cases see Plucknett, A Concise History of the Common Law 280-81, 283-84 (1956).

[166]Howry, 27.

[167]Mayes, History of Education in Mississippi 144 (1899).

[168]Howry, 28.

member of the appellate court. The services of both Stearns and Trotter were cut short by the Civil War. "But both of these professors," the author says, "had the unbounded respect and esteem of those whom they had taught or were teaching. Their reputations were state wide."[169] Judge Trotter did not live long after the War.[170] Professor Stearns, a man of northern birth, was practically exiled, and, although he did not oppose secession and did not want to leave the state, public opinion ran against any man who was considered neutral.[171]

The Department of Law, together with other departments of the University, was closed during the Civil War. The closing of the doors of the University was described by the writer as follows:

> When convulsions were shaking our country from center to circumference and armed legions were preparing to invade the land we love, and when young and willing hands were ready to welcome to hospitable graves those who were preparing to come, it was an exciting period and a solemn hour to those who could not know at that time how much or how many they were to meet. The university boys were lining up with men of mature years, but amid all these momentous scenes, now slowly receding in the shadows of the past, there was a prophecy made for the University of Mississippi, which time seems to have vindicated. Frederick A. P. Barnard, LLD, [sic] then Chancellor of the University, was taking his leave. The doors of the institution were being closed and the retiring official uttered a lament that seemed to come from his heart, that the gathering storm of war had removed afar off the prospect of the distinguished pre-eminence in science of the university, but, as he declared, the institution's celebrity was yet in store and would be realized; —that another generation would behold the fulfilment of the brilliant destiny which awaited the noble institution in whose behalf he had labored so hard. Saddened then, he said, by many a wantonly inflicted and unprovoked annoyance, but illuminated by many a bright ray of encouragement from sources worthiest of regard and stimulated by the confidence he had received from the board of trustees, he bade all its members a cheerful and hopeful farewell.
>
> In the travail of the years all of us might well wish the prophet might be in life to realize the fruits of his own early toil, for he was our friend.[172]

---

[169] *Ibid.*

[170] *Ibid.*

[171] *Ibid.* Stearns left his homestead here, but sold it after the War. The writer of the historical essay was employed by Stearns to enforce the vendor's lien and succeeded in settling the matter, but declined to accept a fee. A year after that it was learned that Stearns had taken his own life. Howry adds, "Efforts were made to learn the causes, but no further intelligence was ever received by anyone in the vicinity as far as I can recall." *Ibid.*

[172] HOWRY, 2. Barnard became President of Columbia College of New York, now Columbia University, where he distinguished himself as one of the nation's

It was Doctor Barnard and Major Edward C. Boynton who were largely instrumental in saving the buildings of the University from the torch of the Civil War. They exerted themselves with administration to have commanders in the field instructed to protect the institution and prevent destruction as far as possible. Howry states that he learned from high sources after the war that commanders were also directed to cooperate with local agencies.[173] According to the author, Boynton, a native of Vermont, was driven northward, by force of public opinion, in the fall of 1861, but because of his love of the South he refused the offer of a commission to become a general of brigade in the Armies of the Union. He finally accepted the rank of major in order to teach cadets, because of the necessity of having an income. His declination to fight the southern people caused him to be placed at the end of the war on severe military duty in the Dry Tortugas from which he felt forced to resign. Boynton was kind to numbers of university students captured and imprisoned in the North. He wrote a history of the United States Military Academy which the author ranks as a work of great value. Howry visited him long after the War in his home near West Point.[174]

The author gives credit to Alexander J. Quinche as "the faithful custodian of the buildings who contributed so largely to the preservation of everything that was left."[175]

After the War, the University reopened its doors.[176] The Honorable Lucius Q. C. Lamar[177] reorganized the Department of Law in 1866-

---

most eminent educators. The author pays tribute to him in these words, "After years of usefulness and fame in its service, he died as one of the most noted and accomplished men of his time, not only in the world of letters, but also in the field of science." *Id.* at 2-3. During Barnard's incumbency at the University of Mississippi, it may be noticed, there was a change in the title of the office; Barnard was President from July, 1856 to November, 1859, and Chancellor from November, 1859 to October, 1861. On Barnard, see CABANISS, 34-35.

[173]HOWRY, 3. Boynton, a veteran of the Mexican War, was elected to the chair of Chemistry in 1856 and served until the Civil War when he was dismissed. CABANISS, 44, 57-58. Cabaniss' view is not in agreement with the view of Howry and others; Cabaniss says that the reported intercession for the University is hardly possible in view of Boynton's dismissal from the faculty. *Id.* at 65.

[174]HOWRY, 3-4.

[175]*Id.* at 3. Quinche was Professor of Latin and modern languages and had been made war-time custodian of campus buildings. CABANISS, 44, 61-62, 67-70. The main part of the town of Oxford had been destroyed. *Id.* at 64-65. Grant's willingness to spare the University buildings has been attributed to the friendship of the families of Grant and Quinche in Galena, Illinois. *Id.* at 64.

[176]After being closed for four years, the University began classes in the fall of 1865 under the Chancellorship of John Newton Waddel who occupied the office from August, 1865, to July, 1874.

[177]He bore the Roman name of Lucius Quintus Cincinnatus Lamar.

1867.[178] Lamar had already attained distinction.[179] He was, in Howry's mind, eminently qualified to teach political science as well as law.[180]

Charles Bowen Howry returned from the War to be the sole Senior in the Law Department in its first post-bellum session of 1866-1867.[181] This memorable occasion in his life and the emotions which welled up within him were depicted by the young, recently returned, soldier in the following passage:

> Reared in the shadow of the University and yet unable to fully share its teaching advantages, the boy was only doing the natural thing to become a soldier. With the return of peace the exercises in the school of his dreams were resumed with the boys who had returned as men. Many were the companions who never returned. They died for home and country. Much water had gone over the dam in those four fateful years. The Old Chapel was still standing when the classes were being reorganized. Those who did return came with their scars and their wounds and with their unsullied honor. The camp fires had been extinguished and the battle scenes had become the events of a glorious past. With the reassembling of these boys was the thought of that vicarious sufferer who was at the time a political prisoner and for whose fate there was anguish. He had led a great movement, not for personal advantage, not for ambition and not for anything beyond the assertion of the natural right to vindicate so far as was practicable the equality of these states under the Constitution. Its principles were our

---

[178]The law course under Lamar was planned as a two-year program, although a student did not necessarily have to remain both years. For an account of the course of study and the text books used, see Meador, 227, 235-36.

[179]Howry, 29. Lamar had taught Mathematics from 1850 to 1852 when Longstreet, his father-in-law, was president. Meador, 227, 230. In the summer of 1866 the Board of Trustees appointed Lamar to the Chair of Ethics and Metaphysics which he had occupied before the War. Cabaniss, 71. After the fall session had been under way, the Trustees requested that Lamar undertake the duties of a professor of law in addition to his other assignments. This was a temporary position, and in January, 1867, he was formally elected Professor of Governmental Science and Law. Meador, 227, 232. From this time until June, 1870, his teaching duties were confined entirely to the Law Department.

[180]Howry, 29. What is significant in the reorganization of the Law Department is the new emphasis. There emerges a law school, in accordance with the national trend, instead of a school of governmental science and law. It marks the departure from the stress on interdisciplinary values and broad cultural outlook to a technical legal training. However, the departure was, in all probability, not a sharp one. As Meador says, "On the whole, the evidence also suggests that after all, despite the appearance of the officially stated course of study, Lamar may have conducted a kind of broad-gauged school of governmental science more or less in the Jefferson tradition." Meador 227, 242-43.

[181]Historical Catalogue of the University of Mississippi, 1849-1909, 368. The total enrollment in Law was 19 and the total enrollment of the University was 246. Meador 227, 237. Fifty-four students received instruction from Lamar during his four-year tenure. *Id.* at 236.

> heritage. History sometimes repeats itself. Greece had her Miltiades, Carthage her Hannibal and Rome her Belisarius. The South had her Jefferson Davis, honored for all time we hope for his fidelity to his people and his love for the Constitution of his country.
>
> Probably no body of young men ever assembled to enter the schools with more determination to make the best of the dark situation than those who assembled at the close of the great struggle. There was, however, a fleck of sunshine there to guide those present to the pathways that led, if not to fame, to something better for the moment. That was to restore the state to its rightful place as a sovereign as far as it was possible to accomplish anything in the peace which then prevailed.[182]

Howry pays tribute to the people of Mississippi who, despite the poverty prevailing after the war, re-opened the law department. He says it should be known not only to the post-bellum generation but to generations to come that agricultural Mississippi faced with the great task of feeding its people, with such great destruction of property and such depletion of man power, yet found it possible to reorganize the school of law and place such a man as Lamar at its head.[183]

The problems of the study of government with all its intricacies, Howry says, appealed to Lamar.[184] In more modern language, Lamar might be said to have been an exponent of interdisciplinary values. As the author of this treatise sees it, law is but one of the inductive sciences, and both fields are but systematized knowledge.[185] Law to Howry "is the calling of thinkers."[186] If there are bad laws, it is because men have not applied systematic principles.[187]

The writer of this study spoke of Lamar's "great mind"[188] which could master legal problems. This is evidenced by his experience as an executive officer who had many decisions to write concerning complicated questions involved in the land laws of the United States.[189] The great quality of his mind can also be seen when as Secretary of the Interior he could hear arguments on both sides and comprehend difficult problems concerning the law of land titles.[190] Again, when his name was submitted to the Senate by President Cleveland for the Supreme Court of the United States, he was confirmed, and since the passions of war had not cooled, this was, indeed, a compliment to his

---

[182]HOWRY, 35-36.
[183]*Id.* at 28-29.
[184]*Id.* at 29.
[185]*Ibid.*
[186]*Ibid.*
[187]*Ibid.*
[188]*Ibid.*
[189]*Ibid.*
[190]*Ibid.*

legal qualifications.[191] His service on the nation's highest tribunal further attests to his great legal capacity. Howry states that Justice Brewer expressed to him that Lamar, "a dear man," was a justice of "the greatest importance"[192] on the Supreme bench in deciding cases. The author of this study states that he does not desire to go more fully into the biography of Lamar,[193] a task which has been already performed by Edward Mayes.[194]

In an earlier day the great capacity of Lamar's mind, it is true, may not always have been appreciated, as he shunned the drudgeries incident to law practice and to which he did not at times apply his intellectual power, but "it was the concurrent opinion at the close of his career that he had climbed the mountain ranges of jurisprudence."[195]

Howry had high admiration for Lamar as a teacher.[196] Lamar enjoyed teaching; he liked working with young men; he was interested in his work, rather than in money. Such is the author's evaluation of those qualities which made Lamar competent in imparting instruction in law.[197]

The Law School was successful under Lamar's guidance. His success in conducting the School of Law was readily concurred in by his Chancellor, Waddel, who felt that with proper funds at his disposal Lamar could do an even better job. Lamar's superior said:

> Our Law School, although doing its important work with such enthusiastic thoroughness and success, under its able and distinguished Professor, is singularly out of keeping with the other Departments, and is itself trammeled and circumscribed by the inadequate resources for its expansion and complete equipment. By a comparison of this School with other Law Schools, its results clearly indicate that it only requires aid to take rank with the best.[198]

---

[191] *Ibid.* Confirmation was by a narrow margin.

[192] *Ibid.*

[193] *Id.* at 30.

[194] LUCIUS Q. C. LAMAR: HIS LIFE, TIMES, AND SPEECHES (1896).

[195] HOWRY, 30.

[196] *Ibid.* For a treatment of Lamar's methods of teaching, see Meador, 227, 239-41. Cate seems to credit Lamar with the introduction of the case method. CATE, LUCIUS Q. C. LAMAR; SECESSION AND REUNION 123-24 (1935). Meador states that while this is possible, present evidence available does not seem to substantiate this claim. Meador, 227, 240, N. 79. The present authors of this treatise on Howry have also been unable to find substantiating evidence to the Cate claim and are in agreement with Meador. However, the present writers find questionable Meador's assertion that the moot court system was Lamar's innovation at Mississippi. *Id.* at 240. For one thing, Howry states that Professor Stearns before the Civil War gave as one of the advantages of law school training at the University the work conducted in moot court trials.

[197] HOWRY, 30. For a study of Lamar's personality as a teacher, see Meador 227, 241-44.

[198] HOWRY, 8. Waddel was, in fact, highly critical of the lack of proper ap-

The students caught something of the professor's enthusiasm for the law.[199] The affection in which he was held by his students was manifest in the invitation of Howry and Thomas B. Manlove to Lamar to join their fraternity, which honor he accepted.[200]

To the writer of this work, Lamar seemed to be not only an approachable professor but a helpful one as well. Howry was not only Lamar's student in law, but he had studied under him earlier, and before his graduation from law school, the student made known to the professor that he had need of a temporary license. He was given a letter of introduction to a Circuit Court Judge, and Lamar advised his young charge that the examiner was well versed on the subject of Limitation of Estates and that it behooved him to read the decisions on the questions involved. The examiner, Judge Clayton, had written some of these decisions and the examination was largely confined to this topic. After a few general questions, the examination was over.[201] The two men, Lamar and Howry, remained friends throughout Lamar's life.[202]

The author of this study alludes to the great service which Lamar extended not only to his students but to the people of Mississippi when as a member of the national House of Representatives and later of the Senate he used his influence to ameliorate conditions for the people of his state.[203]

In 1870 Jordan M. Phipps was appointed Adjunct Professor of Law, and he served during 1870-1871. He was a graduate of the University of

---

propriations for the University as a whole. He compared Mississippi's $50,000 with $475,000 being spent by Harvard, $500,000 by Yale, $100,000 by Cornell, and $372,000 by the University of California. WADDEL, HISTORICAL DISCOURSE DELIVERED ON THE QUARTER-CENTENNIAL ANNIVERSARY OF THE UNIVERSITY OF MISSISSIPPI ON WEDNESDAY, JUNE 25th, 1873 (1873).

[199]HOWRY, 30. The present Law School Building of the University of Mississippi is named in his memory, Lamar Hall. A large portrait of Lamar hangs in the entry. The local chapter of Phi Alpha Delta, one of the two legal fraternities in the School of Law, has been named in his honor.

[200]*Ibid.* Lamar maintained his membership in the organization for the remainder of his life. *Ibid.* While the identity of the fraternity was not disclosed by Howry, it can be said that the fraternity was Sigma Alpha Epsilon. Under the leadership of Thomas B. Manlove, who had become a member of Sigma Alpha Epsilon at the University of Nashville before the War, and a few other students, a chapter of the fraternity was organized on the Mississippi campus. CATE, LUCIUS Q. C. LAMAR: SECESSION AND REUNION 126-27 (1935).

[201]It was not long after graduation before Howry was able to test his mettle in court against his former teacher. In 1868 Howry was pitted against Lamar in suits in federal court, but Meador says it is difficult to say who really won. Meador, 227,248.

[202]HOWRY, 30-31.

[203]*Id.* at 31. For biographical studies refer to CATE, LUCIUS Q. C. LAMAR: SECESSION AND REUNION (1935); 10 D.A.B. 551.

Mississippi in its literary class of 1851. He was, in the words of Howry, "a most excellent teacher of the law."[204] He had also taught mathematics and the writer states that Phipps taught his classes in geometry at sunrise and his pupils were required to be present.[205] He became a probate judge and later moved to Florida where he served in the state legislature.[206]

Another alumnus of the University of Mississippi, Thomas Walton, was appointed professor of law in 1871 and served three years. He was a chancellor of the district, and the author of this work says of him simply, "He was a man of great force of character and discharged his duties well."[207]

In 1874 Alexander P. Stewart became Chancellor of the University. The Law School had closed its doors.[208] The author of this account writes with some feeling:

> There were no law students and none seeking admission. The era of "reconstruction" under federal authority was not over. It was a dark outlook for all the departments of that time. The intervention of the authorities then in power with the threat of Negro students was probably settled. But there was great apprehension that the funds would not be provided to carry on the exercises. It took another year for that peaceful revolution to culminate which swept the aliens and their ignorant cohorts out of the state and returned to its rightful owners the prerogatives and authority of carrying on the state government. The crisis passed after the new chancellor had taken charge.[209]

In the opinion of the writer of this historical sketch, Stewart's appointment was a happy one. The author speaks of "his high character as a former Confederate General, his unwillingness to engage in anything of a political nature,"[210] as well as "his uniform courtesy in the performance of systematic duties."[211] A West Point man, he was known as an accomplished mathematician. He was a man of dignity and austerity and a strict disciplinarian who cared little for social intercourse but "had the respect of everybody."[212] The author adds that he was a Christian gentleman, and devoted to his church in which he regularly taught a Sunday school class.[213]

---

[204] HOWRY, 32.

[205] *Ibid.*

[206] *Ibid.*

[207] *Ibid.*

[208] The Law School was already abandoned at the end of the school year, 1873-1874, and it did not re-open until January, 1877. CABANISS, 95.

[209] HOWRY, 32. The fear that Negroes were to be admitted did not eventuate in reality, and there was little change in the University. CABANISS, 80-81.

[210] HOWRY, 32-32a.

[211] *Id.* at 32a.

[212] *Ibid.*

[213] *Ibid.*

Stewart's austerity was exemplified in the following anecdote told by the writer: Chancellor Stewart went to Howry's office one day to demand of the trustee the names of five young men whom the trustee reportedly had seen drunk and disorderly on the midnight train from Water Valley. The answer was, "General, the boys were not disorderly." "What were they, Sir?" questioned the Chancellor. The reply was that they were hilarious and merry and that they had fled into the next car when they learned that one of the trustees of the University was in the same coach. The names were again requested. Howry refused to be cross-examined, and declined to divulge the names of the students. The Chancellor with great dignity rose and departed with these words, "If that is your idea of helping me govern the young men at the University, good morning." Howry said that he never regretted keeping the identity of the boys from disclosure, for they were approaching graduation. They received their diplomas in due time with the signature of the Chancellor affixed without ever knowing how close was their escape. One of the young men was a law student, and Howry says that one of the others was so inebriated he was hugging a lamp post on that moonlight night, but the trustee added with satisfaction that all five of the boys turned out well in later life.[214]

Professor Walton's successor was Edward Mayes.[215] He conducted the work in law and was Chancellor of the University from August, 1889 until his resignation at the close of the year, 1891. The writer of the historical sketch of the Law School had the deepest respect for Mayes who became a noted figure not only at the University but in the state. For learning in the law, the author declares that he knew few men his equal.[216] Howry practiced law in close contact with Mayes, but never found him out of humor.[217] Honorary degrees were bestowed on him.[218]

Robert B. Fulton succeeded Mayes as Chancellor in 1892. He had graduated from the University of Mississippi in 1869 with first honors in his class. He began his duties on the faculty as a tutor in 1871, and continued to serve the University until his resignation as Chancellor in 1906. Fulton abolished the preparatory classes, and he began summer sessions which enrolled many teachers.[219] His greatest service, in the mind of Howry, was his obtaining a grant in 1894 of over 23,000 acres

---

[214]*Ibid.* On Stewart, see CABANISS, 90-91; 18 D.A.B. 3.

[215]Mayes was the son-in-law of Lamar.

[216]HOWRY, 32b. See also FLETCHER, EDWARD MAYES, THE IDEAL LAWYER [n.d.]. Of interest is MAYES, CHRISTIANITY VERSUS ANARCHY (1887).

[217]HOWRY, 32b.

[218]*Ibid.* Mayes Inn, the local chapter of Phi Delta Phi legal fraternity at the University of Mississippi is named in his honor. On Mayes, see further CABANISS, 111-112; 12 D.A.B. 452.

[219]HOWRY, Insert "A," 32b.

from Congress, on which fully $10,000 was realized annually.[220] Prominent in educational work, in and outside the state, he was a great organizer and served well in a number of scientific enterprises. He was active in the Mississippi Historical Society and as a Trustee of the Department of Archives and History.[221] He was the recipient of many honors and received the honorary degree of Doctor of Laws from three institutions. Howry pays to him the supreme compliment: "The writer knows of no one who contributed more continuous profitable service not only to the University but to the cause of education than Dr. Fulton."[222] At the close of his tenure as Chancellor there were 361 students enrolled in the University and the faculty numbered 31.[223] In glowing terms Howry adds, "A man without enemies; without bitterness; ever interested in the advancement of all that made for educational progress and the better life, Dr. Fulton left as many friends probably as anyone ever connected with the institution."[224]

Mayes was succeeded as the law professor by Albert H. Whitfield in 1892. He was an alumnus of the University of Mississippi, having been an honor man in his class of 1871 and a graduate in law in 1874. After two years service, he resigned to become Chief Justice of the state Supreme Court.[225]

Garvin D. Shands became professor of law in 1894 and Dean of the School.[226] He was a leading lawyer in northwest Mississippi, and had served the state as Lieutenant Governor. The enrollment in the Law School increased and the scope of instruction was extended under this popular professor.[227] He resigned in 1905 to accept a professorship at Tulane University.

Thomas H. Sommerville was appointed to fill the chair originally occupied by Trotter. Sommerville became Dean of the School upon the retirement of Shands.[228] He was most diligent in his work and devoted to his students. He was held in high esteem throughout the university community.[229]

Clarence L. Sivley was elected to fill the position of Professor Sommerville. He was an honor graduate of the Law Department. He resigned to become the attorney of a railroad and moved to Memphis.[230]

---

220 *Ibid.*
221 *Ibid.*
222 *Ibid.*
223 *Ibid.* Fulton closed his educational career in Virginia.
224 *Ibid.* On Fulton, see further 7 D.A.B. 72.
225 *Id.* at 32b.
226 *Ibid.*
227 *Id.* at 33.
228 *Ibid.*
229 *Ibid.*
230 *Ibid.*

To the vacancy left by Sivley there was appointed J. Elmore Holmes, an honor graduate of the law department. Both Sivley and Holmes were men of capacity and talent of a high order, but they did not remain long enough as teachers to establish themselves in the field of education.[231]

As the writer drew to the end of his paper, he took the opportunity to express briefly his philosophy concerning the profession of law. He writes:

> No government can last long independent of the legal profession. Pettifoggers may get into the ranks. The profession may, in a sense, be commercialized and in a measure for some, it may be reduced to a trade. But so long as a recognized standard of ethics be maintained, the spirit of the law for higher purposes will abide. Malefactors may trench upon its precepts, but not enough of these can combine to destroy or defeat the purposes of the just. Empirics in medicine and pedagogues and pretenders who get into the schools may do harm, but whenever the law which keeps society together shall fail, there will be but little left to sustain the other vocations which function under the law.
>
> Those who believe that the practice of law is inconsistent with the principles of pure morality do not realize that the body of professionals are as high in morals, as honorable in dealing, and as upright in conduct as the mass of those who carry on other vocations.
>
> It is the minority working in groups in the name of unity and liberty seeking by the multiplicity of laws and organizing to defeat those who are more intent on the general good than to promote the interests of selfish combinations that we have most to fear. Men of comprehensive knowledge are those to whom the majority look for counsel and guidance on the difficult public questions which divide the great body of the electorate. It has ever been so and ever will be.[232]

The author of RISE AND PROGRESS OF THE UNIVERSITY OF MISSISSIPPI SCHOOL OF GOVERNMENTAL SCIENCE AND LAW closes with the fond hope that just as the intellect contributed by the Law School to the state has more than justified every expenditure made—it has been enough to enrich an empire—so with the passing years the Law School may continue to add strength to Mississippi and her people.[233]

---

[231] *Ibid.*

[232] *Id.* at 36-37.

[233] *Id.* at 37.

THE UNIFORM COMMERCIAL CODE: A PREVIEW

George W. Stengel and Don P. Lacy***

I. Introduction

> No authority need be cited for the proposition that the world of commerce, business, and finance has changed greatly in the last half century. It is equally obvious that much of the law of a half century ago is inadequate to meet the needs and govern the problems which arise today. These facts of modern life gave rise to the proposal for a uniform commercial code.[1]

During its 1966 regular session, the Mississippi Legislature will consider adoption of the 1962 Official Text of the Uniform Commercial Code. At least 43 sister states, and the District of Columbia, have already incorporated the Code into their laws.[2] The Uniform Commercial Code states as its purpose, "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; (c) to make uniform the law among the various jurisdictions."[3] This is a noble undertaking, and one which the draftsmen of the Code appear to have accomplished.

The Code is a voluminous piece of work (the draft which the legislature has before it is 172 legal-sized pages in length), and no single Law Journal article could hope to discuss the entire work in detail. Although the Uniform Commercial Code does not represent a radical departure from present law, it does encompass some significant changes. The most important of these changes, as far as the average practicing attorney is concerned, is in the area of secured transactions. For this reason Article 9 of the Code, entitled "Secured Transactions," will be emphasized in this article. It is anticipated that this article will be the first in a series explaining and clarifying the Code.[4]

---

* Professor of Law, University of Mississippi.

** Member of the Editorial Board, Mississippi Law Journal.

[1] Anderson, Uniform Commercial Code iii (1961).

[2] Braucher & Sutherland, Commercial Transactions viii (1964).

[3] Uniform Commercial Code § 1-102 (2) [hereinafter cited as UCC]. All references are to the 1962 Official Text in the form in which it will be introduced in the Mississippi Legislature.

[4] For a discussion of the history and purposes of the UCC see generally Braucher, *The Legislative History of the Uniform Commercial Code*, 58 Colum. L. Rev. 789 (1958); Hanna, *The Uniform Commercial Code and Mississippi Law of Personal Propery*, 31 Miss. L.J. 123 (1960); Schnader, *Why the Commercial Code Should Be "Uniform,"* 69 Com. L.J. 117 (1964).

The Commercial Code is divided into ten articles and embraces "all the phases which may ordinarily arise in the handling of a commercial transaction, from start to finish."[5]

Article 1 is entitled General Provisions. The first part of this article is concerned with the general rules of construction of the Code and its general scope. The second part provides definitions for terms appearing frequently throughout the Code. Because some new terms are used and new meanings given to some old terms, it is advisable for the practitioner to familarize himself with this part of the Code before handling any transactions which the Code covers.

Article 2 on Sales[6] is essentially a revision of the Uniform Sales Act. Since Mississippi has never adopted the Uniform Sales Act, the lawyers of this state will be dealing with these rules in a statutory form for the first time. They will find most of Article 2 to be a codification of familiar common law principles. The Code[7] contains a statute of frauds with respect to contracts for the sale of goods. The new statute of frauds applies to contracts for the sale of goods for the price of $500 or more. The Mississippi statute of frauds[8] (which applies to contracts for the sale of goods for $50 or more) will be repealed.

Article 3 on Commercial Paper replaces the Uniform Negotiable Instruments Law, which is presently in effect in Mississippi.[9] This Article, it should be noted, does not apply to money, documents of title, or investment securities.[10] In any situation in which a particular type of commercial paper is governed by the provisions of Article 3 and also of any other article, such as Article 4 on Bank Deposits and Collections, the provisions of the other article will control.[11] Article 3 has been discussed by many writers[12] and warrants care-

---

[5]UCC, comment, at 3.

[6]For a discussion of Article 2 see generally Corman, *The Law of Sales Under the Uniform Commercial Code,* 17 RUTGERS L. REV. 14 (1962); Hart, *Sales: Vendor's Liability and Privity,* 36 N.Y.U.L. REV. 1476 (1961); Hawkland, *Consignment Selling Under the Uniform Commercial Code,* 67 COM. L.J. 146 (1962); Hogan, *Highways and Some of the Byways in the Sales and Bulk Sales Articles of the Code,* 48 CORNELL L.Q. 1 (1962); Resnick, *Effect of the Code on Business Contracts,* 18 BUS. LAW. 401 (1963); Warren, *Cutting off Claims of Ownership Under the Uniform Commercial Code,* 30 U. CHI. L. REV. 469 (1963).

[7]UCC § 1-206.

[8]MISS. CODE ANN. § 268 (1956).

[9]MISS. CODE ANN. §§ 42-237 (1956), as amended.

[10]UCC § 3-103 (1).

[11]UCC § 3-103 (2).

[12]For discussion of Article 3 see generally Britton, *Formal Requisites of Negotiability; The Negotiable Instruments Law Compared With the Proposed Commercial Code,* 26 ROCKY MT. L. REV. 1 (1953); Britton, *Holder in Due Course—A Comparison of the Provisions of the Negotiable Instruments Law With Those of*

ful attention. It is a revision and modernization of the Uniform Negotiable Instruments Law. While there are many changes in language, there are only minor changes in substance. Consequently, adoption of this article will not appreciably effect Mississippi lawyers in their practice of law.

Article 4 covers Bank Deposits and Collections. The scope of this Article is adequately reflected by its title.[13] The American Bankers Association Bank Collection Code is replaced by Article 4. At present, Mississippi has only a few meager statutes on this subject.[14] Therefore, the Code will give the state its first modern and comprehensive bank collection code—something that has been needed for many years.

Article 5, on Letters of Credit, represents the first statutory compilation in this area of commercial life, with the exception of scattered provisions such as section 135 of the Uniform Negotiable Instruments Law. In the past, letters of credit have been little used except in international trade. After adoption of the Code they may be used much more frequently in domestic trade.[15]

Article 6 is entitled Bulk Transfers. Here the Code attempts to simplify and consolidate the various Bulk Sales Laws of the states. The purpose of the Article is to prevent fraudulent sales by merchants of their entire stock in trade.[16] Certain transactions are exempted in an attempt to prevent needless red tape in connection with legitimate sales.[17] The Mississippi Bulk Sales Law[18] will be replaced by Article 6.[19]

Article 3 of the Proposed Commercial Code, 49 Nw. U.L. Rev. 417 (1954); Carrington, *Banking, Commercial Paper and Investment Securities Under the Uniform Commercial Code,* 14 Wyo. L.J. 198 (1960).

[13]For a discussion of Article 4 see generally Massachusetts Bankers Association, Bankers Manual on the Uniform Commercial Code (1962); Brown, *Bank Deposits and Collections,* 48 Ky. L.J. 232 (1960); Trumbull, *Bank Deposits and Collections in Illinois Under the Proposed Uniform Commercial Code,* 55 Nw. U.L. Rev. (1960).

[14]Repealed in connection with Article 4 will be Miss. Code Ann. §§ 5278-02, -04, -11 (1956).

[15]For a discussion of Article 5 see generally Bombaugh, *Letters of Credit Under This Article,* 50 Ill. B.J. 600 (1962); Mentschicoff, *How to Handle Letters of Credit,* 19 Bus. Law 107 (1963).

[16]See UCC § 6-101, comment.

[17]UCC § 6-103.

[18]Miss. Code Ann. § 274 (1956).

[19]For a discussion of Article 6 see generally Harris, *The Bulk Sale Under the Uniform Commercial Code,* 64 Com. L.J. 267 (1959); Raff, *Bulk Transfers Under the Uniform Commercial Code,* 17 Rutgers L. Rev. 107 (1962); Rapson, *Problems and Pitfalls in Conducting Bulk Sales,* 68 Com. L.J. 226 (1963); Willier & Hart, *A Practical Approach to Article 6: Bulk Transfers,* Uniform Commercial Code Co-Ordinator, 461 (1963); Note, *What Creditors Are Protected Under Bulk Transfers Provisions of the Uniform Commercial Code,* 43 Iowa L. Rev. 579 (1958).

Article 7, on Documents of Title, consolidates and revises the Uniform Warehouse Receipts Act and the Uniform Bills of Lading Act, as well as some provisions of the Uniform Sales Act which pertain to documents of title.[20] Mississippi presently has the Uniform Warehouse Receipts Act,[21] which will be repealed when the Commercial Code is enacted. The Uniform Bills of Lading Act is not in effect in this state, but there are some statutes on the subject which will be repealed when the code is adopted.[22]

The Uniform Stock Transfer Act, which has been adopted in Mississippi,[23] and portions of the Uniform Negotiable Instruments Law will be superseded by Article 8, Investment Securities. This article is described by the draftsmen of the Code as being like "a negotiable instruments law dealing with securities."[24] It concerns stocks, bonds, and other types of investment paper, some of which are not presently covered by any uniform act.[25]

Article 10 is entitled Effective Date and Repealer. This is the shortest of the articles and is devoted largely to the sections of the Mississippi Code which will be repealed when the Uniform Commercial Code is enacted. Article 10 specifically repeals several uniform laws[26] and many other statutes[27] which are superseded by provisions of the

---

[20]For a discussion of Article 7 see generally Danielson, *Background and Scope of Article 7*, 50 ILL. B.J. 766 (1962); Davenport, *Annual Survey of Developments in the Law of Sales, Bulk Sales, and Documents of Title*, 18 BUS. LAW. 983 (1963); Willier, *Article 7—The Dual Aspects of Documents of Title*, 17 RUTGERS L. REV. 115 (1962).

[21]MISS. CODE ANN. §§ 5012-70 (1956).

[22]MISS. CODE ANN. § 7880 (1956); MISS. CODE ANN. § 7881 (Supp. 1964).

[23]MISS. CODE ANN. §§ 5359-01 to -26 (1956), as amended, MISS. CODE ANN. §§ 5359-06, -17 (Supp. 1964).

[24]UCC § 8-101, comment.

[25]For a discussion of Article 8 see generally Guttman, *Article 8—Investment Securities*, 17 RUTGERS L. REV. 136 (1962); Henson, *Effect of the Code on Commerial Financing*, 1962 ILL. L. REV. 349; Israels, *Transfers of Stock, Bonds and Other Investment Securities*, 19 BUS. LAW 90 (1963).

[26]The following uniform acts which are in force in Mississippi will be repealed when the Code is enacted: THE UNIFORM NEGOTIABLE INSTRUMENTS LAW, MISS. CODE ANN. §§ 42-237 (1956), as amended. THE UNIFORM WAREHOUSE RECEIPTS ACT, MISS. CODE ANN. §§ 5012-70 (1956); THE UNIFORM TRUST RECEIPTS ACT, MISS. CODE ANN. §§ 5080-01 to -23 (1956), as amended; THE UNIFORM STOCK TRANSFER ACT, MISS. CODE ANN. §§ 5359-01 to -26 (1956), as amended.

[27]The following statutes in force in Mississippi will be repealed when the Code is enacted. Assignment of Accounts Receivable, MISS. CODE ANN. §§ 243-01 to -10 (Supp. 1964); Statute of Frauds—Sales of Personal Property, MISS. CODE ANN. § 268 (1956); Bulk Sales Law, MISS. CODE ANN. § 274 (1956); Purchase Money-Lien on Personal Property, MISS. CODE ANN. § 337 (1956); Factor's Lien Act, MISS. CODE ANN. §§ 382-11 to -20 (1956); Chattel Mortgages on Property Owned or to be Acquired, MISS. CODE ANN. § 851 (1956); Where Conveyance of Personal Property Recorded, MISS. CODE ANN. § 863 (1956); Foreign Mortgages on Personal

Uniform Commercial Code. It also contains a general repealer clause which repeals all acts and parts of acts which are inconsistent with the Code. The tentative date on which the Commercial Code will become effective, if it is adopted during 1966, is January 1, 1968.

II. Article 9—Secured Transactions

A. Scope of the Article

The avowed purpose of Article 9 of the Uniform Commercial Code is to "provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty."[28] The Code seeks to accomplish this aim by abolishing the traditional distinctions between the various personal property security devices, which are based on form, and substituting therefor a single type of security interest. Thus, the present formal distinctions between chattel mortgages, deeds of trust, conditional sales contracts, factor's liens, trust receipts, assignment of accounts receivable, and all the other devices of this type, are all abolished. But only their formal distinctions are abolished. In substance, the transactions remain the same. Any security transaction in personality which is possible before the Code will be possible under the Code. The standard forms which are prevalent in this state may still be used under Article 9. The difference which the Commercial Code will make is that only one type of security interest will result, no matter which type of form the parties execute. In other words, a chattel mortgage, chattel deed of trust, and conditional sales contract will all create identical security interests as far as Article 9 is concerned. However, these transactions can have no provisions inconsistent with

---

Property Recorded, Miss. Code Ann. § 870 (1956); Chattel Record Books, Miss. Code Ann. § 884 (1956); Collections May Be Forwarded Direct, Miss. Code Ann. § 5218 (1956); Dishonor or Revocation of Credit as to Demand Items, Miss. Code Ann. § 5218.5 (1956); Stop Payment of Checks or Drafts, Miss. Code Ann. § 5728-02 (1956); Limitation of Time for Presentation of Check, Miss. Code Ann. § 5278-04 (1956); Final Adjustment of Statements of Accounts by Bank With its Depositors, Miss. Code Ann. § 5278-11 (1956); Bill of Lading Conclusive of Receipt of Goods, Miss. Code Ann. § 7880 (1956); Bank to Retain Money Collected on Bill of Lading, Miss. Code Ann. § 7881 (Supp. 1964).

[28]UCC § 9-101, comment. For discussion of Article 9 see generally Coogan, *Guide to Secured Transactions Under the Uniform Commercial Code*, 80 Banking L.J. 195 (1963); Coogan, *Suggested Analytical Approach to Article 9*, 63 Colum. L. Rev. 1 (1963); Coogan & Albrecht, *Does Article 9 of the Uniform Commercial Code Achieve its Purpose?* Uniform Commercial Code Co-Ordinator, 631 (1963); Coogan & Gordon, *Effect of the UCC Upon Receivables Financing*, 76 Harv. L. Rev. 1529 (1963); Gilmore, *Purchase Money Interests, Floating Liens and Article 9*, 76 Harv. L. Rev. 1333 (1963); Spivack, *The Impact of Article 9 of the Uniform Commercial Code on Creditor's Rights in Bankruptcy*, 36 Temp. L.Q. 183 (1963).

the Code and must meet all of its standards and requirements.

Although the location of title to the collateral may still be important for some reasons, such as taxation, the rights and obligations of the parties under Article 9 exist apart from any idea of title. Title to the collateral may be placed in a trustee under a chattel deed of trust, but the security interest created will be the same as one created by a bare agreement which contains no mention of title to the property. The interest created under the Code is a matter of contract between the parties, so they may do what they wish with title to the property.

The terminology of Article 9 is simple and generally it is easily understood. The "secured party" is the person in whose favor a "security interest" exists. The interest is created by entering into a "security agreement" with the debtor. Once this agreement has been executed, and the secured party has given "value," and the debtor has acquired some rights in the collateral, the security interest is said to "attach." At this point the interest is valid as between the debtor and the secured party. By taking additional steps the parties may "perfect" the interest. That is, they may make the interest valid as against third parties. The secured party may perfect his interest by either taking possession of the collateral or by filing a paper called a "financing statement" which asserts his rights in the property. The crux of Article 9 is the attaching and perfecting of the security interest and the resulting rights and obligations of the parties.

A security interest results anytime personal property is encumbered to secure payment of a debt.[29] The parties may create such an interest by signing an agreement to that effect.[30] A security interest will also result from the retention of title by a vendor to protect a purchase money obligation,[31] or from any outright sale of accounts, contract rights, or chattel paper.[32] The security interest arising under these types of sales does so automatically without the necessity of a signed agreement. A lease may also create a security interest if, by compliance with the terms of the lease, the lessee may become the owner of the property for little or no additional value.[33]

B. Transactions Excluded from Article 9

Certain transactions are specifically excluded from the coverage of Article 9, by section 9-104 of that Article:[34] (1) security interests subject to any statute of the United States; (2) landlord's liens; (3)

---

[29]UCC § 1-201 (37).

[30]UCC § 9-201.

[31]UCC § 2-401 (1).

[32]UCC § 9-102 (1)(b).

[33]UCC § 1-201 (37).

[34]For a discussion of these exemptions see Ruud, *Secured Transactions: Article IX*, 16 Ark. L. Rev. 108, 113 (1962).

statutory liens for services rendered or materials delivered; (4) transfer of a claim for wages of an employee; (5) equipment trusts on railroad rolling stock; (6) sales of accounts, contract rights, or chattel paper as part of a sale of the business from which they arose; (7) assignment of contract rights to one who is to render performance under the contract; (8) transfers of interests or claims under insurance policies; (9) rights represented by judgments; (10) rights of set-off; (11) creation or transfer of an interest in or lien on realty, including rents thereon;[35] and (12) transfer of any part of a tort claim, and any deposit or account in a bank, credit union, or similar organization. Although transactions in realty are specifically exempted from this article, a note secured by a mortgage could be the subject of a security interest under the Code.[36]

C. Classification of Collateral

In place of the distinction in form which the Code displaces, there arise new distinctions which are based on the type of property being hypothecated. The draftsmen of the Code assert that the distinctions allow greater flexibility in financing and are functional rather than merely formal in nature. This seems to be true for the most part, although it is difficult to see why the terms "instrument"[37] and "document"[38] should apply to two different types of property.

The Code divides property into two broad classes, tangible property and intangible property, and further divides each of these. The divisions are made because of distinctions throughout the Code which are based on the classification of the property. As we shall see, most of the distinctions based on classes of property have to do with the method of perfecting a security interest in them, and with the priorities to be observed between rival interests in the same collateral. A person who has an interest in an instrument would reasonably be expected to have possession of the instrument. The Code, therefore, requires that a security interest in an instrument be perfected by taking possession of it.[39] A merchant's accounts cannot reasonably be "possessed" by a secured party, so section 9-302 provides for perfection of an interest in this type collateral by filing. These distinctions are reasonable and designed to promote efficiency and fair dealings.

1. *Tangible Collateral*

All tangible collateral is included in the broad class, "goods." This

---

[35]Fixtures are governed by UCC § 9-313, and are not classified as realty within the meaning of UCC § 9-104.

[36]UCC § 9-102 (3) provides, "The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply."

[37]UCC § 9-105 (1)(g).

[38]UCC § 9-105 (1)(e).

[39]UCC § 9-304 (1).

class includes any movable thing or fixture except money, documents, instruments, accounts, chattel paper, general intangibles, contract rights, and other "things in action."[40] Growing crops and animals yet unborn are goods within the meaning of the Code. "Goods" are subdivided by section 9-109 into: (1) consumer goods; (2) farm products; (3) inventory; and (4) equipment. "Consumer goods" are goods used or bought for use primarily for personal, family or household purposes.[41] "Farm products" are crops, livestock, supplies used or produced in farming, and products of crops or livestock in an unmanufactured state (*e.g.*, eggs and milk), if these products are in the possession of a debtor engaged in farming.[42] "Inventory" is goods held by a person for sale or lease or to be furnished under contracts for service, including raw materials, work in process, or materials consumed in business.[43] "Equipment" is goods used primarily in business, or by a debtor which is a non-profit organization or governmental subdivision. Any goods which are neither inventory, consumer goods nor farm products are classed as equipment.[44] All of these subdivisions of goods are mutually exclusive, and they are intended to encompass all tangible collateral.

2. *Intangible Collateral*

There are six classes of intangibles listed by the Code: (1) accounts; (2) contract rights; (3) chattel paper; (4) instruments; (5) documents; and (6) general intangibles. "Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper.[45] "Contract right" is defined as any right to payment under a contract not yet earned by performance and not evidenced by an instrument or chattel paper.[46] "Chattel paper" is a writing *or writings* evidencing both a monetary obligation and a security interest in, or a lease of, specific goods.[47] A promissory note and a separate security agreement given on a purchased article would together constitute chattel paper. An "instrument" is a negotiable instrument under Article 3 or a security under Article 8 of the Code. It is also any writing which evidences a right to the payment of money, other than a security agreement or lease, which is of a type transferred by delivery and endorsement or assignment and in the ordinary course of business.[48] A "document" is a "document of

---

[40]UCC § 9-105 (1)(f).
[41]UCC § 9-109 (1).
[42]UCC § 9-109 (3).
[43]UCC § 9-109 (4).
[44]UCC § 9-109 (2).
[45]UCC § 9-106.
[46]UCC § 9-106.
[47]UCC § 9-105 (1)(b).
[48]UCC § 9-105 (1)(g).

title" as defined by section 1-201(15).[49] It includes bills of lading, warehouse receipts, dock receipts, "and also any other document which in the regular course of business . . ." evidences the right of the party holding the paper to receive and dispose of the goods which the document covers.[50] The paper must purport to be issued by, or addressed to, a bailee and must purport to cover goods in his possession. The final class of intangible collateral, "general intangibles," is a residuary category. Under this heading is included any personal property other than goods, accounts, contract rights, chattel paper, documents, and instruments.[51] "Things in action" are general intangibles. So are patents, trademarks, copyrights, literary rights, performance rights, and goodwill.

It should be remembered that a particular piece of property may be classed as a different type of collateral at different times. For instance, a refrigerator on the showroom floor is "inventory." If it is sold to a family for home use it becomes "consumer goods." If it is purchased by a drugstore for preserving drugs it may be "equipment," and if the drugstore attaches it permanently to the floor it may be a "fixture."

D. The Security Interest

1. *Creating the Interest*

The formal requisites for the creation of a security interest are minimal.[52] For example, retention of title by a vendor to secure the purchase price of personal property creates a security interest in the vendor.[53] A security interest may also be created by any writing which is signed by the debtor and which evidences the intention of the parties to create such an interest. This writing is designated by the Code as a "security agreement."[54]

A security agreement, to create an enforceable interest, need only be signed by the debtor and describe the collateral to be encumbered.[55] If the security interest is one in crops, minerals to be extracted, or timber to be cut, the security agreement must describe the land on which the property is located as well as the property itself. Further evidence of the simplicity of the security agreement under the Code is the fact that any property description is sufficient if it "reasonably identifies

---

[49]UCC § 9-105 (1)(e).

[50]UCC § 1-102 (15). The language of this section illustrates the sometimes confusing tendency of the UCC to circular definitions; a document is a document.

[51]UCC § 9-106.

[52]On the creation of the security interest see generally Lee, *Creaton of Security Interest*, 17 Wyo. L.J. 1 (1962); Note, 8 U.C.L.A.L. Rev. 836 (1961).

[53]UCC §§ 2-401 (1), 1-201 (37); See UCC § 9-101, comment.

[54]UCC § 9-105(1)(h).

[55]UCC § 9-203 (1)(b).

what is described."[56] Proceeds of any type may be adequately described simply as "proceeds."[57] The brief description required for the security agreement is also sufficient for the financing statement, *i.e.*, the instrument which is filed as evidence of the security interest.[58] In connection with the requirements as to descriptions, it should be noted that a description of the realty on which crops, minerals, and timber are located is required in both the security agreement[59] and the financing statement.[60] Where the collateral is a fixture, a real estate description is required in the financing statement, but it is not mentioned as being necessary in the security agreement. It is presumed that such a description will be required; certainly the diligent practitioner will include one.

2. *Attaching of the Interest*

The terms "attach" and "perfect" apply to the security interest at different stages, and the rights of the parties differ according to whether or not the interest has "attached" and whether or not it has been "perfected." Section 9-204 provides that in order for the interest to attach, three requisites must be met: (1) There must exist an agreement that the interest attach; (2) value[61] must have been given by the secured party; and (3) the debtor must have acquired some rights in the collateral.[62] In connection with (3) above, section 9-204(2)(a) provides that the debtor may acquire no rights in crops until they are growing, in minerals until they are extracted, or in timber until it is cut.

If the parties so desire, the security agreement may provide that the interest will attach in the future, as through the use of an after-acquired property clause. In any event, the secured party receives no rights in the collateral until the security interest attaches, that is, until an agreement has been signed, value has been given, and the debtor has acquired rights in the collateral. Once the interest has attached the secured party possesses all the rights in the collateral, as against his debtor, which can arise under the security agreement.

3. *Perfecting the Interest*

While an attached interest gives the secured party rights as against the debtor, additional steps must generally be taken to establish these

---

[56]UCC § 9-110.

[57]UCC § 9-203 (1) (b).

[58]UCC § 9-402 (1).

[59]UCC § 9-203 (1)(b).

[60]UCC § 9-402 (1).

[61]UCC § 1-201 (44)(d) defines "value" as, generally, any consideration sufficient to support a simple contract.

[62]On the attaching of the security interest see generally Coogan, *Inventory Financing Under the Code, the Secured Creditor's Dream?* 68 CONN. L.J. 95 (April 1963).

rights as against third parties. Once these steps are taken the security interest is said to be a "perfected" interest.[63] The steps for perfection are "additional" in the sense that the interest must attach before the secured party acquires any rights in the collateral, but the steps for perfection may in some cases precede those for attaching so that once the interest attaches it attaches as a perfected interest.[64] For instance, a secured party may file a financing statement which announces that a security interest will be created in certain collateral in the future. Therefore, when the security agreement is executed and the interest attaches, it is perfected simultaneously.

The steps to be taken in perfecting a security interest depend, generally, on the type of collateral involved. A purchase money interest in farm equipment valued at $2500 or less, or in any consumer goods, is perfected when it attaches and nothing further is required.[65] In all other cases an interest must be perfected either by taking possession of the collateral[66] or by filing.[67]

The secured party may perfect an interest in goods, instruments, chattel paper, letters and advice of credit, and negotiable paper by simply taking possession of the collateral.[68] In fact, an interest in instruments may be perfected *only* by taking possession of them.[69]

Where the collateral is in the hands of a bailee, other than one who has given a negotiable instrument therefor, the interest is perfected by a form of constructive possession, that is, "by issuance of a document in the name of the secured party or by the bailee's receipt of notification of the secured party's interest. . . ."[70] Collateral of this type may also be made the subject of a perfected interest by filing.

If the collateral is in the possession of a bailee who has issued a negotiable receipt for it, the prescribed method for perfecting an interest in the collateral is by perfecting an interest in the negotiable receipt.[71] For example, a security interest in 100 bales of cotton which are in the custody of a warehouseman would be perfected by pledging the warehouse receipt.

---

[63]On the perfecting of the security interest see generally Goodwin, *Perfection of a Security Interest In Goods and in Documents of Title*, 31 PENN. B.A.Q. 266 (1960); Lee, *Perfection of a Security Interest and the Relative Nature of Perfection*, 17 WYO. L.J. 1 (1963); Silin, *Filing Requirements Under the Uniform Commercial Code*, 3 BOSTON B.J. 13 (1959).

[64]UCC § 9-303 (1).

[65]UCC §§ 9-302 (1)(c),(d).

[66]UCC § 9-303 (1).

[67]UCC § 9-302.

[68]UCC § 9-305.

[69]UCC § 9-304 (1). The duties of the secured party who is in possession of the collateral are given in UCC § 9-207.

[70]UCC § 9-304 (3).

[71]UCC § 9-304 (2).

One important element of perfection by possession, especially as regards those types of collateral in which an interest may also be perfected by filing, is that the perfection by the former method dates only from the time of taking possession and does not relate back to the time of any former act.[72]

Section 9-302 states, as the general rule, that a security interest may be perfected only by filing. Like many other "general rules," it serves primarily as a basis for exceptions. The provisions for perfection by taking possession of the collateral are the major exceptions to this general rule. Filing is the only method for perfecting an interest in accounts, contract rights, and general intangibles.[73] On the other hand, filing is not available as a method for perfecting an interest in an instrument.[74] The filing provisions are not applicable to a security interest in property of a type which is subject to any statute of the United States which provides for central filing or which requires indication on a certificate of title of any security interest in the property.[75]

Under section 9-302, with the exceptions noted above, a security interest may be perfected only by filing a financing statement. The mechanics of filing require that the financing statement must be presented for filing, and the filing fee tendered or the statement accepted by the filing officer.[76] The financing statement must be signed by *both* parties, give their addresses, and describe the collateral by type or by item.[77] The property description in the financing statement, as in the security agreement, "is sufficient whether or not it is specific if it reasonably identifies what is described."[78] Further, where crops, fixtures, minerals, or timber is being hypothecated, the statement must contain a description of the real estate involved.

Under Article 9 the security agreement and financing statement should usually be separate writings, as they perform different functions. The security agreement may be filed, however, if it fulfills the requirements for a financing statement as stated in UCC section 9-402 (1). It should be noted here that the financing statement, unless it is also the security agreement, creates no lien on the collateral but merely serves notice on third parties that the property is, or may at some future time be, subject to a security interest.

---

[72]UCC § 9-305.

[73]UCC §§ 9-302, -304, -305.

[74]UCC § 9-304 (1). The exception to this rule is caused by the fact that UCC § 9-304 (1) provides for perfection of a security interest in chattel paper by filing, and an instrument may be part of chattel paper. The instrument would be the subject of an interest perfected by filing.

[75]UCC § 9-302 (3).

[76]UCC § 9-403 (1). UCC § 9-403 (5) sets the filing fee in this state at $1.00.

[77]UCC § 9-402 (1).

[78]UCC § 9-110.

There are two exceptions to the general rule which requires the signatures of both parties on the financing statement. Only the signature of the secured party is required on a statement used to perfect a security interest in: (1) property which is already subject to a perfected security interest in another state at the time it is brought into this state; and (2) proceeds, if the original collateral was subject to a perfected interest.[79]

A suggested form for the financing statement is given in section 9-402 (3).[80]

4. *Place of Filing*

Section 9-401 provides for either local or central filing (or both), depending on the circumstances and the type of collateral being encumbered.[81] Local filing is required where the collateral is: (1) farm equipment; (2) farm products; (3) accounts, contract rights, or general intangibles relating to the sale of farm products by the farmer; or (4) consumer goods.[82] Filing in such instances is to be made in the office of the Chancery Clerk of the debtor's home county, or if the debtor is a non-resident, in the county in which the goods are located. If the collateral is crops, a filing must be made in the office of the Chancery Clerk of the county in which the land is situated. Multiple filing is necessary if the debtor is a Mississippi resident living in a county other than the one in which the land is located. If the collateral is goods which are fixtures or are to become fixtures, filing must be made in the office where a mortgage on the real estate involved would be filed.[83]

---

[79]UCC § 9-402 (2).

[80]Suggested form for the financing statement.

Name of debtor (or Assignor)
Address
Name of secured party (or Assignee)
Address

1. This financing statement covers the following types (or items) of property:
   (Describe)
2. (If collateral is crops) The above described crops are growing or are to be grown on:
   (Describe Real Estate)
3. (If collateral is goods which are to become fixtures) The above described goods are affixed or are to be affixed to:
   (Describe Real Estate)
4. (If proceeds or products of collateral are claimed) Proceeds—Products of the Collateral are also covered

Signature of Debtor (or Assignor)
Signature of Secured Party (or Assignee).

[81]The UCC filing provisions will replace MISS. CODE ANN. §§ 863, 870, 884 (1956), which will be repealed.

[82]UCC § 9-401 (1)(a).

[83]UCC § 9-401 (1)(b).

All filing other than that listed above is to be made in the office of the Secretary of State.[84] Where filing is to be made with the Secretary of State, there must also be a filing in the county of: (a) the debtor's only place of business, or (b) his residence.[85] The only situation which will require only central filing will be one concerning a non-resident debtor, with no place of business in this state, and a type of collateral for which local filing is not necessary.[86]

A filing accidentally made in an insufficient number of offices or in the wrong office, and therefore ineffective as to part of the collateral, will still be good as to any collateral for which the filing is proper, or as to any third party having actual notice of the security interest.[87] Once filing has been properly accomplished, neither a change of residence by the debtor nor a change of location of the collateral will defeat the perfected interest.[88]

5. *Duration of Filing*

A properly filed financing statement will be effective for a maximum period of five years, unless a continuation statement is filed. If the financing statement reflects no maturity date, or if the secured obligation is payable on demand, the statement is automatically effective for the maximum period of five years, but no longer. If there is a stated maturity date of less than five years, the statement will continue to be effective for a period of 60 days *beyond* the maturity date. A stated maturity date of more than five years will serve to make the statement effective for only five years.[89]

A continuation statement may be filed within six months before, or 60 days after, a stated maturity date of five years or less. If the automatic five year period of effectiveness is applicable, as when no maturity date is given in the financing statement, the continuation statement must be filed within six months before the end of the five year period. A filing made *after* the end of the five year period will not serve to continue the interest. The maximum length of time available to any security interest will be five years and 60 days, unless a continuation statement is duly filed. This would occur where the financing statement shows a maturity date of five years; the continuation statement could be filed within 60 days after the stated maturity date. The maximum period for which any continuation statement can lengthen the security interest is five years. Of course, any number of successive continuation statements may be filed. The statement must be signed

---

[84]UCC § 9-401 (1)(c).
[85]UCC § 9-401 (1)(c).
[86]See UCC § 9-401.
[87]UCC § 9-401 (2).
[88]UCC § 9-401 (3).
[89]UCC § 9-403 (2).

by the secured party and refer by file number to the original financing statement.[90]

6. *Temporary Perfection*

Under Section 9-304, there are two situations in which a creditor may perfect a security interest for a period of 21 days without the necessity of filing or taking possession of the collateral.

Under the first of these situations, "a security interest in instruments or negotiable documents is perfected without filing or the taking of possession for a period of twenty-one (21) days from the time it attaches to the extent that it arises for new value given under a written security agreement."[91] Such a temporary perfection will not prevail against a purchaser for value of chattel paper or of a non-negotiable instrument, who takes possession in the course of business and without knowledge of the prior security interest.[92] Certain other types of purchasers and holders of instruments, documents, and securities will take priority over a temporarily perfected interest (and even fully perfected interest).[93]

The second situation in which temporary perfection may occur involves a perfected security interest in an instrument, negotiable document, or goods in the possession of a bailee (other than one who has issued a negotiable instrument therefor). Such an interest will *remain* perfected for a period of 21 days when the secured party relinquishes possession of the collateral to the debtor in either of two ways: (1) by making the goods or documents representing them available to the debtor for sale or exchange, or for loading, shipping, manufacturing, or otherwise using them preliminary to sale or exchange; or (2) by delivering the instrument to the debtor for ultimate sale, exchange, presentation, collection, renewal, or registration of transfer.[94] The temporary perfection in these two situations is not dependent on the giving of new value, and the 21 day period runs from the time the collateral is delivered to the debtor. Here, as in the first instance of temporary perfection, innocent purchasers of the instrument, document, or security will prevail over the secured party.[95] If a party has a temporarily perfected interest and achieves perfection by filing or taking possession of the collateral during the 21 day period, the perfection will be deemed continuous.[96]

---

[90]UCC § 9-403 (3).

[91]UCC § 9-304 (4).

[92]UCC § 9-308.

[93]UCC § 9-309. This section protects holders in due course of negotiable instruments, holders of duly negotiated documents of title, and bona fide purchasers of securities, as against any perfected security interest in the instruments, documents, or securities, even if the interest is perfected by filing.

[94]UCC § 9-304 (5).

[95]UCC §§ 9-308, -309.

[96]UCC § 9-303 (2).

E. Priorities Under Article 9

1. *Generally*

The order of priority between conflicting security interests in the same collateral is governed by section 9-312 of the Code.[97] This section enumerates special situations which are in turn controlled by other sections of the code; some of these will be discussed later in this writing. When none of the special rules apply, priority between conflicting interests is determined as follows:

(1) In the order of filing if both interests are perfected by filing, regardless of which interest attached first and whether or not it attached after filing. This is the "first to file" rule.[98]

(2) In the order of perfection unless both are perfected by filing, regardless of which interest attached first and whether or not it was perfected before or after filing. This is the "first to perfect" rule.[99]

(3) In the order in which the interests attached, according to section 9-204 (1), if neither is perfected.[100]

To state these rules in another way, when an interest attaches it is valid against the debtor, so the first interest to attach will take priority over other perfected interests unless all are perfected by filing. If both conflicting interests are perfected by filing, the "first to file" rule applies. The important thing to note about this rule is that a secured party may gain priority by filing first even though he does not have an attached interest at the time he files.

2. *Purchase Money Priorities*

Of special priority situations provided for in the Code, those concerning purchase money security interests are among the most important.[101] A security interest is a "purchase money security interest" to the extent that it is: (1) taken or retained by the seller of the collateral to secure all or part of its price; or (2) taken by a person who gives value to enable the debtor to acquire rights in the collateral, if such value is in fact so used.[102] Note that the value given by the secured party must in fact be used to purchase the collateral. For

---

[97]For a discussion of priorities under Article 9 see generally Coogan, *Priority Rules Under Article 9 of the Uniform Commercial Code,* 72 HARV. L. REV. 855 (1959); Egan, *Priorities Under Article 9 of the Uniform Commercial Code,* 38 CONN. B.J. 174 (1964); Note, 8 U.C.L.A.L. REV. 898 (1961).

[98]UCC § 9-312 (5)(a). For illustrations of this rule see UCC § 9-312, comment.

[99]UCC § 9-312 (5)(b).

[100]UCC § 9-312 (5)(c).

[101]Repealed in connection with purchase money security interests will be MISS. CODE ANN. § 337 (1956). On purchase money security interests see generally Lee, *Conflicting Claims and Priorities,* 17 WYO. L.J. 1 (1963); Note, *Purchase Money Security Interests,* 68 YALE L.J. 761 (1959).

[102]UCC § 9-107.

example, if A loans money to B for the purchase of inventory and B uses the money for other purposes, later buying the inventory from C on credit, A does not acquire a purchase money security interest in the collateral. Assuming that A and C file financing statements covering the collateral, if C gives notice of his purchase money interest as required by section 9-312 (3), C will have an interest which will take priority over the interest of A. C will have priority even if A files his financing statement first.

A purchase money security interest in inventory takes priority over conflicting security interests if three conditions are met.[103] First, the purchase money interest must be perfected at the time the debtor takes possession of the collateral. Second, before the debtor receives possession of the property, notification of the purchase money interest must be given to any secured party who is known to the holder of the purchase money security interest, or who has filed a financing statement covering the same collateral before the purchase money interest is filed. Third, the notification must state that the person giving notice has acquired or expects to acquire a purchase money security interest in the inventory, and must describe the inventory by item or type.

A purchase money security interest in any collateral other than inventory takes priority over other interests in the same collateral if it is perfected before the debtor takes possession of the property or within ten days thereafter.[104] No notice to other secured parties is required in this situation.

A purchase money security interest will take priority over the rights of lien creditors or transferees in bulk[105] if these rights arise after the attaching of the purchase money interest.[106] The term "lien creditor" as used here includes trustees in bankruptcy, receivers in equity, and assignees for the benefit of creditors.[107] The secured party in this case has a ten day grace period, after the debtor takes possession of the property, in which to file and perfect his interest.

3. *Other Priorities*

Special priority situations, other than those we have mentioned, are covered in various sections of the Code and are listed in section 9-312. Among these are priorities as to fixtures[108] and the crop pro-

---

[103]UCC § 9-312 (3).

[104]UCC § 9-312 (4).

[105]UCC § 6-102 (1) defines a "bulk transfer" as "any transfer in bulk and not in the ordinary course of the transferror's business of a major part of the materials, supplies, merchandise or other inventory of an interprise subject to" Article 6 of the UCC.

[106]UCC § 9-301 (2).

[107]UCC § 9-301 (3).

[108]UCC § 9-313.

duction loan security interest.[109]

The foregoing has dealt largely with priorities as between perfected security interests. Section 9-301 enumerates those persons whose rights take preference over unperfected security interests: viz., (1) persons given priority under section 9-312, (i.e., the special priority situations); (2) lien creditors without knowledge of the security interest who become creditors before the interest is perfected; (3) an unsecured purchaser of goods, instruments, documents, and chattel paper who is a transferee in bulk or otherwise not in the ordinary course of business takes priority to the extent that he gives value and receives possession of the collateral without knowledge of the interest and before it is perfected; and (4) persons giving value for accounts, contract rights, and general intangibles without knowledge of the interest and before it is perfected. It should be remembered with regard to lien creditors and transferees in bulk, that a secured party with a purchase money interest may file within ten days after the debtor takes possession of the property and still perfect his interest.[110]

F. After-Acquired Property

"[A] security agreement may provide that collateral, whenever acquired, shall secure all obligations covered by the security agreement."[111] The Code provides two exceptions to the above provision that any after-acquired property may be subject to the original security agreement if the parties so desire.[112] Crops grown more than one year after the agreement is executed are subject to special rules, and will be discussed under section H of this article.

The other exception to the after-acquired property rule is that consumer goods (other than accessions)[113] are not subject to the original security interest when they are given as additional security. An after-acquired property provision will serve to hypothecate consumer goods if the debtor acquires rights in them within ten days after the secured party has given value under the security agreement.

The status of after-acquired property in bankruptcy proceedings against the debtor is not entirely clear.[114] Fixtures present another

---

[109]UCC § 9-312 (2).

[110]UCC § 9-301 (2).

[111]UCC § 9-204 (3), text and comment 2. In connection with the after-acquired property provisions of the UCC, MISS. CODE ANN. § 851 (1956) will be repealed. On the subject of after-acquired property see generally Coogan, *After-Acquired Property*, 72 HARV. L. REV. 851 (1959); Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem*, 62 COLUM. L. REV. 49 (1962).

[112]UCC §§ 9-204 (4)(a),(b).

[113]UCC § 9-314.

[114]See UCC § 9-108, comment 1. See also Coogan & Gordon, *Effect of the U.C.C. Upon Receivable Financing*, 76 HARV. L. REV. 1529, 1548 (1963).

problem within the area of after-acquired property. When fixtures are encumbered, local filing is required,[115] and a description of the real estate involved must appear in the financing statement.[116] If after-acquired fixtures should be attached to real estate other than that described in the original financing statement, a subsequent filing might be required in order to provide a description of the new real estate involved. The Code does not consider this problem, and its solution will be up to the courts of this state. If a subsequent filing should be required, the concept of after-acquired property, under Article 9 will be weakened.

G. Future Advances

"Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment."[117] By the language of this section, both optional and obligatory future advances are specifically sanctioned under Article 9. Not only may presently given value be secured by property of the debtor acquired in the future, but a security interest in presently owned collateral may cover value given by the secured party in the future. This fact, combined with the code provision that a debtor may be allowed to use or dispose of collateral in his business without invalidating a security interest in that collateral,[118] evidence the Code's approval of the "floating lien." Under this type of arrangement the debtor may give a security interest in his accounts and inventory and, while receiving cash advances as needed, continue to apply proceeds from sales and collections to his business.[119]

H. Crops[120]

Section 9-204 (1) provides that in order for a security interest to attach there must be an agreement, value must be given by the secured party, and the debtor must have acquired some rights in the collateral. It is also stated that "the debtor has no rights . . . in crops until they are planted or otherwise become growing crops. . . ."[121] In other words, the parties may sign a security agreement covering crops and file a financing statement, but until the crops are "planted or otherwise

---

[115]UCC § 9-401 (1)(b).

[116]UCC § 9-402 (1).

[117]UCC § 9-204 (5). See generally Coogan, *The "Floating Lien" Under Article 9*, 72 HARV. L. REV. 850 (1959).

[118]UCC § 9-205.

[119]For a discussion of future advances, after-acquired property, and floating liens, see Weingarten, *Article 9 of the Uniform Commercial Code: Definitions and Rules of General Application*, 9 WAYNE L. REV. 537, 551 (1963).

[120]On the subject of crops as collateral see generally Goebel, *Farmers and the Code*, 1962 ILL. L. REV. 372.

[121]UCC § 9-204 (2)(a).

become growing crops," no security interest in them can exist. For an interest to attach to crops under an after-acquired property clause the crops must "become such" no later than one year after the agreement is executed.[122] An exception to this rule is provided in the case of a security interest in crops given in conjunction with a lease, or land purchase or improvement transaction. If the transaction is evidenced by a contract, mortgage, or deed of trust and if the security agreement so provides, the interest may attach to any crops grown on the land for the duration of the real estate transaction.[123]

Some priority is given to crop production loan security interests. Under Article 9, a crop production loan is one which is given to enable production of a crop during the growing season, with value being given not more than three months before the crops become growing crops. A security interest for such a loan takes priority over any earlier perfected interest which secures an obligation due more than six months before the crops become growing crops, regardless of whether or not the prior interest is known to the secured party advancing the crop production loan.[124]

I. Fixtures

Section 9-313 of the Code determines the priority of security interests in fixtures, while leaving the exact definition of the term to the law of this state.[125] Generally, an interest in goods which attaches before the goods become fixtures takes priority as to the property over the claims of persons having an interest in the real estate to which the goods are affixed.[126] An interest in the fixtures which attaches after they are attached to the real estate takes priority over all subsequent interests in the real estate, and over any prior interest if the holder of that interest gives his consent.[127] An unperfected interest in fixtures will not take priority over: (1) a subsequent purchaser for value of an interest in the realty; (2) a creditor with a judgment lien on the realty; or (3) a creditor with a recorded prior encumbrance, to the extent of any subsequent advances. In order for any of these three parties to enjoy priority they must acquire their interest without notice of the adverse interest in the fixtures, and before that interest is perfected.[128] It would seem that if a secured party perfects his interest

[122]UCC § 9-204 (4)(a).

[123]UCC § 9-204 (4)(a).

[124]UCC § 9-312 (2).

[125]On the subject of fixtures see generally Coogan, *Security Interests in Fixtures Under the U.C.C.*, 75 HARV. L. REV. 1319 (1962); Kennedy, *Secured Interests in Fixtures*, 14 RUTGERS L. REV. 536 (1960); Shanker, *An Integrated Financing System For Purchase Money Collateral; A Proposed Solution to the Fixture Problem Under Section 9-313 of the Uniform Commercial Code*, 73 YALE L.J. 788 (1964).

[126]UCC § 9-313 (2).

[127]UCC § 9-313 (3).

[128]UCC § 9-313 (4).

in goods by filing, and before they become fixtures, his interest will have priority over all others.[129]

A secured party may, on default, remove the fixture from the realty to which it is attached, but he must reimburse any encumbrancer or owner of the realty (other than the debtor) for any actual damage to the real estate occasioned by the removal.[130]

The rules for filing as to fixtures have already been mentioned. It should be noted that an encumbrance on fixtures may still be created "pursuant to the law applicable to real estate."[131] The Code does not elaborate on this point.

J. Accessions

An accession is defined by Article 9 as goods "installed in or affixed to other goods."[132] For example, if an electric starter motor is attached to a diesel tractor, the electric motor is an accession. The rules of priority as to accessions are almost exactly the same as those applicable to fixtures,[133] with the obvious difference that accessions are goods attached to other goods, while fixtures are goods attached to real estate.

An interest in goods which attaches before they are installed, and thereby become accessions, takes priority over any interest in the whole.[134] In our example about the electric starter motor, the "whole" spoken of would be the deisel tractor. An interest which attaches after the goods are affixed takes priority over any subsequent interest in the whole, and over any prior interests if the holder of that interest gives his assent.[135] A security interest in the goods to be attached does not take priority over the rights of certain types of creditors and lien holders who acquire their rights without notice of the security interest.[136] The secured party, in the event of default by the debtor, may remove his property from the whole, but must reimburse any encumbrancer or owner of the whole (other than the debtor) for any actual injury to the whole which results from the removal.[137]

---

[129]See Coogan, *Security Interests in Fixtures Under the U.C.C.*, 75 HARV. L. REV. 1319 (1962).

[130]UCC § 9-313 (5).

[131]UCC § 9-313 (1).

[132]UCC § 9-314 (1). For a discussion of accessions see generally Goodwin, *Fixtures to Real Estate and Goods Attached to Other Goods*, 31 PENN. B.A.Q. 269 (1960); Kennedy, *Security Interests in Accessions*, 14 RUTGERS L. REV. 539 (1960).

[133]*Compare* UCC § 9-314 *with* UCC § 9-313.

[134]UCC § 9-314 (1).

[135]UCC § 9-314 (2).

[136]UCC § 9-314 (3).

[137]UCC § 9-314 (4).

K. Commingled or Processed Goods

Commingled or processed goods are those which become part of a single product or mass. For example, flour is commingled with other ingredients to produce bread, which is referred to for Code purposes as the mass. Goods need not completely lose their identity in the product to be classed as commingled or processed goods, thus leaving only a fine line at best between identifiable commingled goods on the one hand and accessions on the other. A perfected security interest in commingled or processed goods will continue in the product or mass in favor of the secured party in two cases: (1) if the goods completely lose their identity in the mass; or (2) if the financing statement covering the goods before they are commingled also covers the product into which the goods are manufactured or assembled.[138] If more than one interest attaches to the product through this method, they will rank equally according to the ratio that the cost of the separate goods bears to the cost of the product.[139]

Tin, lead, and antimony are commingled to produce printing type. Likewise, a new starting motor attached to a diesel tractor would almost certainly be deemed an accession. It is not clear, however, what the status of a crankshaft would be when inserted into the same deisel engine. The secured party might be able to treat the crankshaft as either an accession[140] or as commingled goods which retain their identity.[141] Should he choose the former course the secured party could proceed only against his goods, the crankshaft, while in the latter course he would be obliged to include the mass, i.e. the tractor, in his financing statement. The secured party would probably have to exercise his option, and his choice would depend largely upon the individual circumstances.

L. Inventory, Accounts[142]

Under the rule of *Benedict v. Ratner*[143] a secured creditor who allowed his debtor to exercise complete dominion over the collateral (as to its disposition and use) was in danger of losing his lien. The

---

[138]UCC § 9-315 (1).

[139]UCC § 9-315 (2).

[140]UCC § 9-314.

[141]UCC § 9-315.

[142]On the subject of inventory and accounts as collateral see generally Coogan, *Inventory Financing Under the Code, the Secured Creditor's Dream?* 68 CONN. L.J. 95 (April 1963); Craig, *Accounts Receivable Financing: Transition From Variety to the Uniform Commercial Code,* 42 B.U.L. REV. 187 (1962); Gordon, *The Security Interest in Inventory Under Article 9 of the Uniform Commercial Code and the Preference Problem,* 62 COLUM. L. REV. 49 (1962); Note, *Financing the Dealer's Inventory,* 51 KY. L.J. 142 (1962); Note 75 HARV. L. REV. 437 (1961).

[143]268 U.S. 353 (1925).

code specifically negates this rule: "[A] security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or a part of the collateral . . . or to collect or compromise accounts . . . or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral."[144] As mentioned earlier, this provision taken in conjunction with section 9-204 allows the use of a "floating lien" on merchandise and accounts.[145]

A security interest in inventory will have no effect against a buyer of the goods in the ordinary course of business. The security interest, unless it is an interest in farm products purchased from a farmer, will fail regardless of whether or not the buyer had notice of the security interest and whether or not the interest was perfected.[146] A security interest in inventory, accounts, or both will prevail against the rights of creditors, and was apparently intended to be valid as against trustees in bankruptcy.[147]

M. Proceeds

Proceeds are defined, in section 9-316, as "whatever is received when collateral or proceeds is sold, exchanged, collected or otherwise disposed of."[148] A check received in payment in the sale of secured property would be the proceeds of that property. Likewise, if a merchant's accounts were encumbered by a perfected interest, goods returned by a credit purchaser would be proceeds of the account created when the goods were sold.

A perfected security interest in collateral will continue in both the collateral and in any identifiable proceeds of the collateral unless the secured party consents to the sale, or unless one of the other exceptions listed by the code occurs.[149] The perfected interest in the proceeds will be good for a period of ten days only, unless: (1) the financing statement includes proceeds as collateral; or (2) an interest in the proceeds is perfected within the 10 day period.[150] If the secured party files, or otherwise perfects his interest in the proceeds, during the ten day period the security interest will be continuously perfected. A failure to either include proceeds in the financing statement or perfect

144UCC § 9-205.

145See UCC § 9-204, comment 3.

146UCC § 9-307 (1).

147See Coogan, *Security Interests in Fixtures Under the U.C.C.*, 75 HARV. L. REV. 1319, 1547 (1962).

148UCC § 9-306 (1). For a discussion of security interests in proceeds see generally Kennedy, *Secured Interests in the Proceeds of Sale of Collateral*, 14 RUTGERS L. REV. 531 (1960); Spivack, *Financing the Manufacturer*, 48 KY. L.J. 397 (1960).

149UCC § 9-306 (2).

150UCC § 9-306 (3).

an interest in the proceeds after they are received may be especially disadvantageous in certain circumstances. Even though the perfected security interest will normally continue in the original collateral, some transactions, such as the sale of consumer goods in the ordinary course of business, cut off any security interest in the goods.[151] A failure to perfect an interest in the proceeds of such a sale would leave the secured party with no interest in any collateral.

If goods are sold on credit, the resulting account will be the proceeds of the goods. If the account or a chattel paper, which results from the sale, is transferred to a secured party and the goods are then returned or repossessed, a special priority situation is presented. Section 9-306 (5) enumerates the priorities to be observed:

(a) If the goods were originally collateral for a still unpaid obligation, the original security interest reattaches to the returned goods if it was perfected at the time of sale. In other words, the goods revert to the classification of inventory again, rather than becoming proceeds of the chattel paper or account which resulted from their sale. If the interest in the goods was not perfected by filing, the secured party must take possession of the returned goods or file as to them on their return.

(b) If the sale of the goods resulted in a chattel paper, an unpaid transferee of that paper acquires a security interest in the returned goods as against his transferor. This security interest is prior to an interest asserted under (a), above, to the extent that the transferee of the chattel paper was entitled to priority under section 9-308.[152]

(c) An unpaid transferee of an account has a security interest in the goods against the transferor, but subordinate to an interest asserted under (a) or (b), above. An interest arising under (b) or (c) must be perfected in order to prevail against creditors of the transferor and subsequent purchasers of the returned goods. That is, the interest must be perfected by filing or taking possession of the goods after the goods are returned.

Section 9-306 (5) contains one of the few patent ambiguities encountered in Article 9. The purchaser of chattel paper resulting from the sale of goods has an interest in the goods, when they are returned, which is prior to an interest asserted by the person who has an interest in the goods before their sale, to the extent that the transferee was entitled to priority under section 9-308. That section gives the purchaser of chattel paper for new value, and in the ordinary course of business, an interest in the paper superior to one asserted merely as proceeds of inventory. If sections 9-306 (5)(b) and 9-308 are read together,

[151]See UCC § 9-307 (1).
[152]UCC § 9-306 (5)(b).

they seem to indicate that the purchaser of the chattel paper for new value, who takes possession of it in the ordinary course of business, will acquire an interest in the returned goods superior to that of the party whose interest was in the goods before sale. This is apparently not true, because the Official Comments to section 9-306 describes a joint interest in the returned goods.[153] The surest way to avoid any problems in this area is by taking a security interest in both the goods to be sold and any accounts or chattel paper of the debtor.[154]

In the event of insolvency proceeding by or against the debtor, a party with a perfected interest in "proceeds" has a perfected interest: (1) in identifiable non-cash proceeds; (2) in identifiable cash proceeds, that is, in money not commingled with other money or deposited in a bank; (3) in identifiable cash proceeds in the nature of checks and the like; and (4) in all cash and bank accounts if the other cash proceeds are commingled.[155] Under the last of these provisions the interest is subject to any right of set-off and is limited in amount to the cash received by the debtor for a period of ten days prior to the beginning of the insolvency proceedings, less any cash actually paid to the secured party during that period.[156]

N. Default

Part 5 of Article 9 deals with the secured party's rights on the debtor's default.[157] Basically the secured party must elect to proceed either through the courts or under the sales provisions of the Code. He may also rely on any specific remedies provided for in the security agreement.[158] If both real and personal property are covered by the security agreement, the secured party may proceed against only the personalty under the Code, although he may use other means and proceed against both the personal property and the realty.[159] The old distinctions based on possession at the time of default are no longer applicable under the Code.[160]

Generally, most of the remedies available to the secured party are automatically available and need not be listed in the security agreement. A provision in the agreement seems to be necessary in order

---

[153]See UCC § 9-306, comment 4.

[154]See Weingarten, *supra* note 119.

[155]UCC § 9-306 (4).

[156]UCC § 9-306 (4)(d). See UCC § 9-306, comment 2.

[157]For discussion of rights and procedures after default see generally Dennon, *Liquidation of Collateral For Defaulted Loans Under the Code,* 18 Bus. Law. 1087 (1963); Note, *Rights and Remedies of a Secured Party Upon Default,* 8 U.C.L.A.L. Rev. 951 (1961); Note, *Secured Transactions: Remedies on Default,* 14 Wyo. L.J. 35 (1959).

[158]UCC § 9-501 (1).

[159]UCC § 9-501 (4).

[160]See UCC § 9-501, comment 2.

to require the debtor to assemble the collateral and make it available to the secured party.[161] Likewise, the security agreement may affect the amount allowable to the secured party to defray foreclosure expenses.[162] Only those rights with respect to compulsory disposition of collateral (section 9-505 (1)), and redemption of collateral (section 9-506), may be waived in the security agreement. The agreement may, however, determine the "standards by which the fulfillment of these rights and duties is to be measured if such standards are not manifestly unreasonable."[163]

Section 9-504 controls the method of sale of the collateral by the secured party. The sale, lease, or other disposition may be either private or public in nature. The collateral may be sold as a unit or in parcels, and by one or more contracts. As long as the disposition is in a "commercially reasonable" manner it may be made at any time and place and on any terms.[164] From the fact that "any terms" may be used, it is assumed that the sale may be on credit as well as for cash.

The secured party is required to send reasonable notice to the debtor of the time of the sale unless the collateral is: (1) perishable; (2) likely to suffer a sharp value decline; or (3) is of a type usually sold on a recognized market. Where notice to the debtor is required, and the collateral is not consumer goods, notice must also be sent to any other person with a security interest in the collateral who is known to the secured party or who has filed a financing statement which is indexed to the debtor's name.[165] The notice must be "sent," which includes mailing or "any other usual means of communication."[166]

The proceeds of the sale, or other disposition of the property, are to be applied in the following order: (1) to the reasonable expenses incurred in taking, preparing for sale, and selling the collateral, and (to the extent provided for in the agreement) reasonable attorney fees and legal expenses; (2) to the satisfaction of the obligation secured by the interest; and (3) to any subordinate secured obligations on receipt of demand from the junior secured party. Proof of the junior interest must be furnished the secured party if he asks for it, and if proof is not forthcoming the demand for proceeds need not be met.[167] The debtor is entitled to any surplus over the amount of his indebtedness, and he is liable for any deficiency. If the collateral consists of accounts, contract rights, or chattel paper the debtor is liable for de-

[161]See UCC § 9-503.
[162]UCC § 9-504 (1)(a).
[163]UCC § 9-501 (3).
[164]UCC § 9-504 (3).
[165]UCC § 9-504 (3).
[166]UCC § 1-201 (38).
[167]UCC § 9-504 (1)(c).

ficiencies and entitled to surplus only if the security agreement so provides.[168]

Section 9-505 (1) describes the situation in which disposition of the collateral is compulsory. If 60% of a secured obligation on consumer goods has been satisfied, the secured party must dispose of the collateral within ninety days after taking possession, and must use the Code method of sale. The debtor may renounce this right by signing a paper to that effect, but the paper must be signed *after* default has taken place. If the secured party fails to meet these requirements, the debtor may sue him on the theory of conversion,[169] or he may recover "not less than the credit service charge plus ten per cent of the principal amount of the debt or the time price differential plus ten per cent of the cash price."[170]

If the collateral is property of a type other than consumer goods, or is consumer goods on which less than 60% of the obligation has been satisfied, the secured party may retain the collateral in satisfaction of the obligation. Notice of intent to retain the collateral must be sent to the debtor and, if consumer goods are not involved, to any other party with a security interest in the property. If any person entitled to receive notice objects in writing within 30 days after the secured party takes possession, the property must be sold under section 9-504.[171]

Unless the debtor or other secured party waives his rights at some time after default and in writing, he may redeem the collateral by paying the debt and reasonable expenses at any time before the collateral is sold under section 9-504 or is retained according to section 9-505 (2).[172]

Section 9-507 prescribes the liability of the secured party for failure to comply with the default provisions of the Code and provides remedies for the debtor. A court order may be used to halt any unauthorized proceedings. If the sale has already taken place the debtor, or another secured party, may recover any actual losses occasioned by failure of the secured party to comply with the Code. If consumer goods are involved the debtor may recover not less than the credit service charge plus 10% of the principal of the debt, or the time price differential plus 10% of the cash price.[173]

The secured party need only proceed in a "commercially reasonable" manner. The fact that a better price could have been obtained at a different time or through a different method of disposition is not alone sufficient to show that the sale was not "commercially reasonable."

168UCC § 9-504 (2).
169UCC § 9-505 (1).
170UCC § 9-507 (1).
171UCC § 9-505 (2).
172UCC § 9-506.
173UCC § 9-507 (1).

A sale at the current market price, or in any recognized market for such goods, or in conformity with other commercial practices among dealers in this type of property is deemed to be a sufficient compliance with Article 9.[174]

O. Conflict of Laws

Article 9 is applicable "so far as concerns any personal property and fixtures within the jurisdiction of this state,"[175] except as to specifically excluded transactions[176] and some multistate transactions.[177] Section 9-103 applies specially to conflict of laws situations.[178] Although the provisions of this section are too complicated to permit comprehensive discussion in an article of this nature, some of the high points will be noted.

If the office in which the assignor of contract rights or accounts keeps his records is in this state, the Code will control as to any security interest in those accounts or contract rights. Otherwise the law (including the conflict of laws rules) of the state in which the office is located will apply.[179]

If the debtor's chief place of business is in this state, Article 9 will control security interests in general intangibles, or goods of a type normally used in more than one state, such as automotive equipment. In order for this rule to apply the goods must be classified as equipment or as inventory. If these conditions are not met, the law of the state in which the debtor's chief place of business is located will control. If the debtor's chief place of business is located in another state (one which does not provide for perfection by filing) the secured party may file and perfect in this state.[180]

If property of a type other than that covered in the two preceding paragraphs is already subject to a security interest when it is brought into this state, the law of the state in which the interest attached will control as to the validity of the interest in this state. However, if the parties involved in the transaction anticipated that the property should be kept in this state, and it was in fact brought into this state within 30 days after the interest attached, the validity of the interest would be decided under Mississippi law.[181]

---

[174]UCC § 9-507 (2).

[175]UCC § 9-102 (1).

[176]UCC § 9-104.

[177]UCC § 9-103.

[178]On the subject of conflict of laws and the UCC see generally Malcolm, *The Problem of Conflict of Laws in Commercial Transactions*, 13 Bus. Law. 497 (1958); Vernon, *Recorded Chattel Security Interests in the Conflict of Laws*, 47 Iowa L. Rev. 346 (1962).

[179]UCC § 9-103 (1).

[180]UCC § 9-103 (2).

[181]UCC § 9-103 (3).

Property which is subject to a perfected security interest at the time it is brought into this state will continue to be subject to a perfected interest for a period of four months. Perfection may be achieved in this state during the four month period and will be deemed continuous. If perfection is achieved in this state after expiration of the four months, it will date from the time of its perfection here.[182]

Where a certificate of title to personal property is issued under a state statute which requires a notation on the certificate of any security interest in the property, the laws of the state issuing the certificate will control as to perfection of the security interest.[183]

Obviously, there will not be many conflicts of laws questions under the Code because the law will usually be the same in all of the states which have contacts with any commercial transaction. However, in view of the fact that many states which have adopted the Code have retained their automobile certificate of title laws, a great many controveries will continue to arise in this field.

III. Conclusion

The Uniform Commercial Code is, indeed, massive in volume and extensive in coverage. After its adoption it will be involved in every commercial transaction thereafter consummated in this state. Most transactions will be affected by it in several different ways. Three questions have been frequently asked with regard to its adoption in Mississippi:

(1) How will the Code improve our system of commercial law in Mississippi?
(2) How will the Code affect Mississippi lawyers in their practice?
(3) How can the Mississippi Legislature (or any legislature) understand what it is doing when in enacts such a massive piece of legislation?

Those questions will be answered very briefly. The Code will give us—for the first time—a codification of the law of sales, bank collections, letters of credit and bills of lading. We presently have only a few meager statutes on these subjects, and most questions in those fields have to be determined by case law. The Code will also give us revised and modernized codifications of the law with respect to negotiable instruments, bulk transfers, warehouse receipts, investment securities and secured transactions. Mississippi presently has one of the most inadequate and antiquated systems of commercial law in the United States. Upon adoption of the Uniform Commercial Code, it will be on a par with the most modern. The Code will also conform the

[182]UCC § 9-103 (3).
[183]UCC § 9-103 (4).

commercial law of Mississippi with the laws of the other states (comprising 95% of the country's population) which have adopted the Code. After the Code is adopted, industries from other states which desire to open branches in Mississippi will not have to worry about the effects of strange commercial laws; they will already be familiar with the Code.

With the exception of Article 9, the Uniform Commercial Code will hardly affect Mississippi lawyers in their day to day practice. The law that is familiar to them with respect to negotiable instruments, sales, bank collections, bulk transfers, warehouse receipts, bills of lading and investment securities will, in general, remain the same. The changes made by the Code involve, for the most part, minor points of law which most lawyers have not memorized and have to look up whenever a question arises. They will find it much easier to find the answers to such questions under the Code than under existing law.

With respect to Article 9, however, attorneys will have to change their manner of thinking. No longer will they think in terms of chattel mortgages, conditional sales contracts, chattel deeds of trust, trust receipts, factor's liens, assignments of accounts receivable, etc. Those terms will be as obsolete as the common law forms of action in a state which has adopted the Federal Rules of Civil Procedure. Under the Code there is only one chattel security device, viz., a security interest. In handling secured transactions under the Code, the attorney must focus his attention on the type of collateral, i.e., whether it consists of goods, accounts, contract rights, chattel paper, documents or instruments. If the collateral consists of goods, he must decide whether they are consumer goods, equipment, farm products or inventory. He must also determine whether they will become fixtures. He will encounter many new terms, and many old terms will have new connotations. However, this will not be as difficult as it, at first appears. In general, the attorney will use the same documents for all chattel security transactions, viz., a security agreement and financing statement. After the Code is adopted, attorneys will only have to become familiar with those two documents and learn where to file the financing statement for the various types of collateral. The place (or places) of filing will depend upon the type of collateral. When an attorney becomes familiar with the security agreement and financing statement (both simple documents) and learns where to file the financing statement for the various types of collateral, he can handle any secured transaction which he has handled under the present system. Generally, he will find it easier under the Code. About a year after the Uniform Commercial Code became effective in Kentucky, a Kentucky lawyer said: "When the Code was adopted, I wondered how we would get along with it; now I wonder how we ever got along without it."

Obviously, a legislator—or any person—who reads the Uniform

Commercial Code cannot be expected to comprehend all of its ramifications. The Pennsylania legislators, who adopted it in 1953, must have had a great deal of courage and credence. Their action must have been predicated on the fact that the Code had been prepared through the joint efforts of the Commissioners on Uniform Laws and the American Law Institute after several years of work by outstanding lawyers and at a cost of over $400,000. Those facts were not as convincing to the New York legislators. Before New York adopted the Code, it submitted it to the New York Law Revision Commission for study. The Commission employed consultants to study the Code and held many public hearings on it. After three years of study, and expenditure of $300,000, the Commission suggested various amendments to the Code. Those suggestions were incorporated into the 1958 Official Text of the Code. As several states had departed from the 1958 Official Text when they adopted the Code, a Permanent Editorial Board was established in 1961 to preserve uniformity. The Board passed on all of the amendments which had been made or proposed by the various states, and those which it approved were incorporated into the 1962 Official Text. The bill before the Mississippi Legislature is the 1962 Official Text. Well over $1,000,000 has been spent on that draft. In addition, an enormous amount of valuable time has been contributed gratuitously by lawyers and legal scholars. Undoubtedly, the bill to adopt the Uniform Commercial Code has been the subject of more study —and cost more to prepare—than any bill which has ever been considered by the Mississippi Legislature. But the Mississippi legislators do not have to rely upon that. The Code has now been subjected to the "acid test" in most of the nation. It has been adopted in 43 states. These include all of the leading industrial states. In some of them, it has been in operation for several years. Pennsylvania has had it since 1954. In all of the states in which the Code has been adopted, it has operated smoothly and with surprisingly little litigation. The Code works well in practice. Mississippi legislators need have no fears in adopting it.

BAD CHECKS

*George Warner**

I. Introduction

At common law, one who obtained goods by drawing a check on a bank in which he had no funds or credit could not be prosecuted for cheating, because there was, in such case, no false public token.[1] There was no crime at common law on "bad checks."

Many jurisdictions have statutes directed specificially against the use of worthless checks.[2] Such statutes condemn fraud in obtaining money or property through drawing or uttering a worthless or bogus check. The purpose of these statutes is to discourage the mischief to trade, commerce, and banking which a worthless check inflicts. The constitutionality of these statutes has been assailed as being within the prohibition against imprisonment for debt, if the element of fraudulent intent on the part of the person issuing the check is lacking. If provision is made for the element of fraudulent intent or the statute is worded so that such intent may be supplied by judicial interpretation, the statutes are valid.[3]

The first bad check law was passed in Mississippi on February 12, 1916, being chapter 120, Laws of 1916, and first appeared in the Code as sections 897 and 898 of the Code of 1917. Section 897 was carried forward and appears as section 923 in the Code of 1930. Each of these sections, together with section 924 in the Code of 1930, provided that the failure of the person drawing, uttering, or delivering a check to pay, after its non-payment and ten days written notice by the holder would be prima facie evidence of obtaining the amount of the check, draft, or order for goods or property by false pretenses. These sections were declared unconstitutional and void on May 2, 1932, in the case of *State v. Johnson*.[4] The Supreme Court of Mississippi held these sections were the use of the criminal process of the Court to enforce the collection of debts and violated Miss. Const. art. III, Sec. 30 (1890), which prohibits imprisonment for debt. No written notice of non-payment is required under the present law.

The present Mississippi bad check law, passed February 19, 1958, is as follows:

---

* District Attorney, Tenth District, Meridian, Mississippi.

[1]Broadus v. State, 205 Miss. 147, 38 So. 2d 692 (1949); 22 Am. Jur. *False Pretenses* § 56 (1939).

[2]See generaly, 22 Am. Jur. *False Pretenses* §§ 62-3 (1939).

[3]*Ibid.*

[4]163 Miss. 521, 141 So. 338 (1932).

False Pretenses—bad checks.

If any person, with intent to defraud, shall make, issue and deliver to another person, for value, any check, draft or order on any bank or other depository and thereby obtain from such other person any money, goods or other property of value, and have no funds or have insufficient funds on deposit to his credit in such bank or depository with which such check, draft or order and all other checks, drafts or orders upon such funds then outstanding may be paid, or who, after having made, issued, uttered or delivered any such check, draft or order for the payment of money upon any bank or other depository, shall with intent to defraud withdraw or cause to be withdrawn, the money or any part thereof, to the credit of the maker of such draft, check or other order for the payment of money without leaving with such bank or other depository a sufficient sum to cover such check, draft or other order for the payment of money and all other checks, drafts or orders upon such funds then outstanding, and same shall not be paid by such bank or depository on presentation, he shall be guilty of a misdemeanor, or a felony, as is hereafter specified, and, upon conviction thereof, shall be punished as is hereafter provided. In all cases, the drawer of such check, draft or order shall be prosecuted in the county in which he delivered the same. Proof that such person had no funds or insufficient funds on deposit to his credit in said bank or depository to pay said check, draft or order and all other checks, drafts or orders upon such funds then outstanding at the time when same was so made, issued and delivered, or that after having made, issued, uttered or delivered such check, draft or order he withdrew or caused to be withdrawn, the money or any part thereof to his credit, without leaving with such bank or other depository a sufficient sum to cover such check, draft or other order and all other checks, drafts or orders upon such funds then outstanding, shall be prima facie evidence of such intent to defraud, provided such check, draft or order shall be presented for payment at the bank or other depository upon which it was drawn, not over thirty days after the date when such check, draft or order was so uttered, issued or delivered.

For the first offense of violating this act, where the check, draft or order involved be less than $25.00, the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than $25.00, nor more than $500.00, or by imprisonment in the county jail for a term of not less than five days nor more than six months, or by both such fine and imprisonment, in the discretion of the court.

Upon commission of a second offense of violating this act, where the check, draft, or order involved is less than $25.00, the person committing such offense shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine of not less than $50.00, nor more than $1,000.00 or by imprisonment in the county jail for a term of not less than thirty days, nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

Upon commission of a third or any subsequent offense of violating this act, regardless of the amount of the check, draft or order involved, and regardless of the amount of the checks, drafts or orders involved in the prior convictions, the person committing such offense shall be guilty of a felony and, upon conviction, shall be punished by imprisonment in the state penitentiary for a term of not less than one nor more than five years.

Where the check, draft or order involved shall be twenty-five dollars ($25.00) or more, the person committing such offense, whether same be a first or second offense, shall be guilty of a felony and, upon conviction, shall be punished by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the state penitentiary for a term of not more than three years, or by both such fine and imprisonment, in the discretion of the court. Upon conviction of a third or any subsequent offense, the person convicted shall be punished as is provided in the immediately preceding paragraph hereof.[5]

The venue is set by the statute. The drawer of the check, draft, or order must be prosecuted in the county in which he delivered the same.

The related statute on the form of affidavit is as follows:

Sec. 2154. False pretenses—form of affidavit in case of non payment. Under the foregoing section the following form of affidavit shall be sufficient.

THE STATE OF MISSISSIPPI
County of . . . . . .

Before me, the undersigned justice of the peace in and for district No. . . . . of said county, personally came . . . . (affidavit) who being first duly sworn, says that . . . . (defendant) in the county and district aforesaid, on or about the . . . . day of . . . . A.D. . . . . did unlawfully and feloniously (if for a felony, or did "unlawfully" if for a misdemeanor) issue and deliver unto . . . . for value, (stating value thereof and thing received) his (or her) certain check (draft or order as the case may be) of the words and figures as follows: (here copy it). When he, the said . . . . (defendant)had insufficient funds on deposit with the said . . . . (name of bank or depository) with which to pay the same or (and after issuing and delivering said check, draft or order, as the case may be, did withdraw or cause to be withdrawn, the money or any part thereof to the credit of the maker of such draft, check or other order for the payment of money without leaving with such bank or other depository, a sufficient sum to cover such check, draft or other order for the payment of money) and same has been presented to said bank (or depository) for payment and has not been paid, against the peace and dignity of the State of Mississippi.

(Affiant's signature) . . . .

Sworn to and subscribed before me,
this the . . . . day of . . . . A.D. . . . .

(Officer's signature) . . . .[6]

---

[5]MISS. CODE ANN. § 2153 (Supp. 1964).
[6]MISS. CODE ANN. § 2154 (1956).

An affidavit which follows precisely the above form and charges that the check was issued with intent to defraud is sufficient to charge the defendant with violation of the bad check law.[7]

II. Elements of Crime and Proof Under Bad Check Law

Prima Facie Case:

A. intent to defraud,
B. know of, make, issue, and deliver check, draft, or order,
C. on any bank or depository,
D. obtain money, goods, or property of value in one or the same transaction,
E. when there are no funds or insufficient funds to pay the check and all others outstanding,
or
withdraw or cause to be withdrawn all or sufficient money so checks or drafts then outstanding cannot be paid,
F. check, draft, or order not paid by bank or depository on presentation,
G. check, draft, or order is presented for payment at bank or depository upon which it is drawn within 30 days.

The crime is complete without (G) above, but the check, draft, or order must be presented within 30 days in order to establish a prima facie case. Where all the facts are in evidence and sharp issue between prosecution and defense is drawn, the case is for the jury, and the state is not entitled to prima facie case construction.[8]

III. Intent to Defraud

A. In General:

A bad check law which does not require intent to defraud or knowledge of insufficiency of funds, and which provides for dismissal of prosecution on payment of the check, violates the constitutional provision prohibiting imprisonment for debt.[9]

The intent to defraud is an essential element of the state's case in a bad check prosecution. The failure to allege intent to defraud goes to the essence of the offense, and the ommission in the indictment is not waived by a failure to demur.[10] In most jurisdictions when the state shows the check has been returned unpaid, (if presented for payment within 30 days in Mississippi), there is a presumption of intent to

[7]Moore v. State, 205 Miss. 151, 38 So. 2d 693 (1949).
[8]*Ibid.*
[9]State v. Johnson, 163 Miss. 521, 141 So. 338 (1932).
[10]Herron v. State, 118 Miss. 420, 79 So. 289 (1918).

defraud, and the state has made a prima facie case. The defendant does not have the burden to prove himself not guilty, but he is required to overcome the presumption of fraud. No false representation or pretense is necessary, extrinsic to a check itself which is in fact worthless, that the check is good or will be paid. However, reliance by the defrauded party on the worthless check is essential to a conviction.[11]

The statutory reference to intent to defraud has no reference whatever to the question whether the defendant intended to repay the debt. It is no defense that the defendant has made restitution or is able and willing to repay the money obtained or intended at some future time to repay.[12]

The defendant may overcome the presumption or inference of fraud by showing a bank error in returning the check as sufficient funds were on deposit; that funds were withdrawn without his knowledge and prior to presentment by someone else authorized to draw on his account; that the account had been attached by legal proceedings; that a deposit had been charged back to his account because of an unpaid check or draft; or other evidence that would conclusively show lack of fradulent intent.[13]

It is not sufficient to show that an accused has obtained money from another by false pretenses. It must be shown that the person from whom the money was obtained was actually deceived.[14]

B. "Insufficient Funds"—"No Account":

There is no apparent difference under the Mississippi statute in a check returned for "insufficient funds" and one marked "no account," although in the later instance the jury probably would be more inclined to find fraud.

Disclosure by the drawer that he does not have funds in the bank to cover the check when it is issued is generally sufficient to show the non-existence of a crime. It is considered an extension of credit to the drawer.[15] The person from whom money, goods, or porperty of value is obtained must have relied on the check being good for the defendant to violate the bad check law, and he could not rely on a check he knew was worthless. However, the fact that the injured party had an illegal intent ordinarily will not preclude a conviction.[16] If the victim

---

[11]See 22 AM. JUR. *False Pretenses* §§ 57, 64, 67 (1939).

[12]Odom v. State, 130 Miss. 643, 94 So. 233 (1922), *sugg. error overruled* 132 Miss. 3, 95 So. 253 (1923); 22 AM. JUR. *False Pretenses* §§ 61, 69 (1939).

[13]Wolf v. State, 76 Fla. 168, 79 So. 449 (1918); State v. Thompson, 37 N. Mex. 229, 20 P.2d 1030 (1933).

[14]Bruce v. State, 217 Miss. 368, 64 So. 2d 332 (1953).

[15]State v. Ellis, 67 Ariz. 7, 189 P.2d 717 (1948); Shepherd v. People, 109 Colo. 582, 129 P.2d 104 (1942); Hammack v. State, 114 Miss. 611, 75 So. 436 (1917).

[16]22 AM. JUR. *False Pretenses* § 59 (1939).

has regularly taken checks from the defendant that were returned for "insufficient funds" or "no account", this evidence may be sufficient to show that the victim was not defrauded.[17]

C. Stop-Payment:

Stop-payment is not covered under the Mississippi statute. Generally, it is a question of intention at the time the check is given and property is obtained with the check whether a crime is committed.[18] Where one has sufficient funds to meet a check but has the intention to stop payment of it at the time he issues it, such acts constitute the crime of obtaining money by false pretense.[19] However, if prior to issuing the check the drawer has previously directed the bank to stop payment on all checks of a class, including the check in question, the check would probably violate the Mississippi bad check law.[20]

D. Postdated Checks:

The giving of a postdated check is considered not to be a violation of the bad check law by many states.[21] The giving of a postdated check and advising the payee or person to whom it is delivered that the same is postdated would not be a crime.[22] This would include the giving of a postdated check under an agreement that it shall not be presented until the day it is dated, as it does not constitute a false promise as to a present fact and is not false pretenses. This is only a promise of funds on deposit at a future time. Both of the previous examples amount to an extention of credit.[23] Under this view a postdated check is treated as a promissory note.[24] Some courts hold that postdating without calling attention to it may be a violation.[25]

It is submitted that in Mississippi a postdated check is within the statute, unless notice of the postdating is given or an agreement that the check will not be deposited is made. In either case, the payee would be advised of the insufficient funds and would be extending credit. There is no specific Mississippi case on postdated checks, but states with similar bad check laws hold that a postdated check is within a statute which provides that no person with intent to defraud shall make a check upon any bank if such person has insufficient funds or credit

---

[17]Huffman v. State, 205 Ind. 75, 185 N.E. 131 (1933).

[18]*Contra*, State v. Alick, 62 S. Dak. 220, 252 N.W. 644 (1934).

[19]22 Am. Jur. *False Pretenses* § 58 (1939).

[20]See *Id.* § 66.

[21]Berry v. State, 153 Ga. 169, 111 S.E. 669 (1922); Nedderman v. State, 198 Ind. 187, 152 N.E. 800 (1926); State v. Crawford, 198 N.C. 522, 152 S.E. 504 (1930); see generaly 22 Am. Jur. *False Pretenses* § 70 (1939).

[22]Hammack v. State, 114 Miss. 611, 75 So. 436 (1917).

[23]See Mercer v. Commonwealth, 332 S.W.2d 655 (Ky. 1960).

[24]Gibbs v. Commonwealth, 273 S.W.2d 583 (Ky. 1954).

[25]*E.g.*, State v. Larsen, 76 Idaho 528, 286 P.2d 646 (1955).

with such bank.[26] If a worthless postdated check is accompanied by a false representation inducing the payee to accept the check in payment for property of value, the defendant is guilty of obtaining money under false pretenses.[27]

IV. Know of, Make, Issue, and Deliver Check, Draft, or Order

The defendant must make, issue, or deliver the check himself or be a party to the crime by either directing that the act be done or have knowledge that a check is worthless when he endorses and passes it. Unless he knows a check made by someone else is worthless, he has committed no crime.[28] This applies when the defendant is the endorser or is named as drawee but did not deliver the check.

It would be difficult to prove a person having authority to draw on another's account had knowledge of insufficiency of funds or intent to defraud. This would apply to any situation where the drawer did not have control of or continuing knowledge of an account.[29]

Where a corporate officer issues a worthless check in the corporate name, he is guilty of violating a bad check statute. The contention that the corporate officer is not criminally responsible because he signed the check merely as agent for the corporation is generally rejected to prevent the corporate officer from shielding himself from criminal responsibility for his own act.[30]

One real problem for the merchant and the prosecutor is the two-party check. This is a check passed by the payee, who endorses the check, and later claims that as far as he knew, the check was good. The Mississippi statute probably does not apply to endorsers unless the endorser and drawer are one and the same. However, the endorser could be prosecuted under the general false pretense statute,[31] if the proof would show that the endorser knew the check was not good before passing it. The Mississippi Supreme Court has held that the giving of a bad check may, under certain circumstances, constitute the offense of obtaining property under false pretense.[32] If the defendant

---

[26]*E.g.*, Patterson v. State, 194 Ark. 488, 107 S.W.2d 545 (1937); People v. Bercovitz, 163 Cal. 636, 126 Pac. 479 (1912); State v. De Nocola, 163 Ohio St. 140, 126 N.E.2d 62 (1955).

[27]Blakeney v. State, 216 Miss. 211, 62 So. 2d 313 (1953).

[28]State v. United States Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697 (1953); O'Bryant v. Cokman, 169 Miss. 776, 152 So. 59, *sugg. of error sustained* 169 Miss. 776, 154 So. 259 (1934).

[29]Winters v. Griffis, 233 Miss. 102, 101 So. 2d 346 (1958).

[30]Clifton v. State, 51 Del. 339, 145 A.2d 392, 68 A.L.R.3d 1266 (1958); Thompson v. State, 85 Ga. App. 298, 69 S.E.2d 206 (1952).

[31]Miss. Code Ann. § 2149 (1956).

[32]Blakeney v. State, 216 Miss. 211, 68 So. 2d 313 (1953).

assumes the name of another and endorses a check payable to him, this would constitute false pretenses under Miss. Code Ann. Sec. 2146 (1956).[33]

In any instance of endorsement, the problem can arise that as between the drawer and payee of the check it may have been a post-dated check; a check given for a preexisting debt; a check which the payee knew was worthless; or other possible defenses under the bad check law. However, these points should make no difference in a prosecution for false pretenses when it can be shown that the endorser knew the check was worthless.

The passing of a worthless check signed in a fictious name is within the condemnation of the statute.[34]

V. Obtaining Money, Goods, or Property of Value In One or the Same Transaction and Payment of Existing Debt

"Ordinarily the crime of false pretense through obtaining money or property upon a worthless check is committed when the check is delivered and the money or property is obtained."[35] The proof must show that the injured party delivered the property or money in exchange for the check and on faith that the check was presently good. If the property leaves the possession of the injured party, however short the period of time, without his demanding and receiving the purchase price, he extended credit for the same. In such instance, the check would be in discharge of a preexisting debt and outside the purview of the bad check law.[36] The statute does not apply when the goods have already been delivered or passed completely out of the possession of the seller and away from his hands and premises in a completed transaction. However, if the delivery of the check for the goods was practically synchronous and part of the same transaction, the bad check law applies.[37]

A bad check in payment of a debt for past services rendered, such as a salary check to an employee, is not a crime. If the check is not issued in advance of the performance of the labor and the service was not rendered in consideration for the check, then the check is given only to discharge the indebtedness for the work. A prosecution thereon would violate the constitutional prohibition of imprisonment for debt.[38]

---

[33]Hinman v. State, 179 Miss. 503, 176 So. 264 (1937).

[34]See 22 Am. Jur. *False Pretenses* § 72 (1939).

[35]*Id.* § 60.

[36]*E.g.*, State v. Harris, 136 So. 2d 633 (Fla. 1962); Broadus v. State, 205 Miss. 147, 38 So. 2d 692 (1949).

[37]Moore v. State, 205 Miss. 151, 38 So. 2d 693 (1949).

[38]Blakeney v. State, 206 Miss. 85, 39 So. 2d 767 (1949).

It is submitted that an agreement for payment in cash for services rendered, *i.e.*, repair work in a garage, is probably covered, at least, to the extent of the parts, if the check is given when the car is picked up or the fruits of the services are received. In this instance there is an exchange for the check at the time of delivery.

The payee of a bogus check need not be actually damaged in order that an offense under the bad check law be committed.[39] However, it is not sufficient to show that an accused has obtained money from another by false pretenses; it must be shown that the person from whom the money was obtained was actually defrauded.[40]

In a prosecution for obtaining money under false pretenses, a check which is received and cashed in due course, is the equivalent of "money," being the immediate instrumentality by which the money is obtained.[41]

The object of the bad check statute is primarily to reach the machinery of fraud or deceit practiced by one person upon another in obtaining something of value by false pretenses. The term "property of value" is an enlargement and not a restriction on tangible personal property. The professional services of a physician or lawyer, or the services of a wage hand in the field or employee in the factory are "property of value." The mechandise of the storekeeper is his stock in trade. So are the services of the doctor, lawyer, or mechanic, and these should not be deprived of their property by false pretenses any more than other persons.[42]

The word "obtain" in a false pretense statute "means acquisition of title to property or ownership thereof, and does not include mere acquisition of possession."[43]

Although Mississippi, by constitution and statute, prohibits a prosecution on a check for a bad debt, some states make this a crime by the wording of the statute, which includes the use of a bad check in payment of a preexisting debt.[44] There is no Mississippi case on the subject, but a bad check used to pay an old account in order to obtain new credit may be a crime, for it is the obtaining of "something of value."[45] So also the statue may be violated by a bad check in payment of wages to induce an employee to continue work, or a bad check to forestall a suit.

---

[39]Berry v. State, 153 Ga. 169, 111 S.E. 669, 35 A.L.R. 370 (1922).

[40]Bruce v. State, 217 Miss. 368, 64 So. 2d 332 (1953).

[41]Martin v. State, 200 Miss. 142, 26 So. 2d 169 (1946); Simmons v. State, 165 Miss. 732, 141 So. 288 (1932).

[42]State v. Ball, 114 Miss. 505, 75 So. 373 (1917).

[43]Courtney v. State, 174 Miss. 147, 164 So. 227 (1935).

[44]People v. Freedman, 11 Cal. App. 2d 611, 245 P.2d 45 (1952); Tullis v. State, 230 Ind. 311, 103 N.E.2d 353 (1952).

[45]See State v. Billington, 36 N.W.2d 393 (Minn. 1949); State v. Riccardo, 33 N.J. Super 89, 107 A.2d 807 (1954) (*dictum*).

Although Mississippi has not yet passed on the question, it was held in Iowa that a worthless check in the amount of $30.00 given to pay $28.00 on an account and the receipt of $2.00 in cash amounts to a felony rather than a misdemeanor.[46] This would probably be the result under the wording of the Mississippi statute.

VI. Suggested Possible Defenses On Bad Checks

(A) Lapse of time between delivery of property and delivery of check.[47]

(B) Check in payment of debt for past services rendered.[48]

(C) Check for preexisting debt.[49]

(D) Check drawn by agent of defendant and he has no knowledge, thus no intent as to its effect.[50]

(E) "Bad check law" *probably* is barred by two year statute of limitation, Miss. Code Ann. Sec. 2437 (1956), notwithstanding exception for false pretenses and statute is styled "False pretense—bad checks."[51]

(F) No knowledge of insufficient funds.[52]

(G) Defendant told prosecution witness that check was no good but would make deposit to cover it.[53]

(H) Postdated check, although probably a crime if the defendant does not call attention to the date.[55]

(I) Check on which payment is stopped,[54] since stop payment is not covered specifically by the statute.

(J) Defendant is endorser or is named as drawer but did not draw the check, unless he was a party to the scheme to defraud or had knowledge thereof.[56]

---

[46]State v. Dillard, 225 Iowa 915, 281 N.W. 842 (1938).

[47]See Broadus v. State, 205 Miss. 147, 38 So. 2d 692 (1949).

[48]See Blakeney v. State, 206 Miss. 85, 39 So. 2d 767 (1949); Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 151 So. 743 (1934).

[49]See Broadus v. State, 205 Miss. 147, 38 So. 2d 692 (1949).

[50]See Lovelace v. State, 191 Miss. 62, 2 So. 2d 796 (1941).

[51]See Blakeney v. State, 216 Miss. 211, 62 So. 2d 313 (1953).

[52]See Hammack v. State, 114 Miss. 611, 75 So. 436 (1917).

[53]See *ibid.*

[54]See *ibid.*; State v. Helms, 14 N.J. Misc. 564, 186 A. 463 (1936).

[55]*Contra,* State v. Alick, 62 S. Dak. 220, 252 N.W. 644 (1934); Downs v. State, 99 Ga. App. 43, 107 S.E.2d 569 (1959). Probably would have to indict under general false pretense statute.

[56]See Siegel v. Commonwealth, 176 Ky. 772, 197 S.W. 467 (1917), 177 Ky. 232, 197 S.W. 809 (1917); Dawson v. State, 79 Tex. Crim. 371, 185 S.W. 875 (1916); 22 Am. Jur. *False Pretenses* § 66 (1939).

(K) No intent to defraud.[57]

Intent or willingness to repay or actual repayment or return is *NO* defense.[58]

VII. Related Criminal Statutes

A. Mississippi Statutes

There are four criminal statutes in Mississippi closely related to the bad check law. One or more of these may be violated in the passing or attempt to pass a bad check. The general false pretense statutes in Miss. Code Ann. (1956), are as follows:

> Sec. 2146. False pretenses and cheats—representing or personating another, and thereby receiving money or property.
>
> Every person who shall falsely represent or personate another, and, in such assumed character, shall receive any money or valuable property of any description, intended to be delivered to the individual so personated, shall, upon conviction, be punished in the same manner and to the same extent as for feloniously stealing the money or property so received.

Assuming the name of another and endorsement of a check payable to him is a pretense within the meaning of the act.[59]

> Sec. 2149. False pretenses and cheats—obtaining the signature, money or property of another.
>
> Every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by another false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, or valuable thing, upon conviction thereof, shall be punished by imprisonment in the penitentiary not exceeding three years, or in the county jail not exceeding one year, and by fine not exceeding three times the value of the money, property, or thing obtained.

The giving of a bad check may, under certain circumstances, constitute the offense of obtaining property under false pretenses.[60]

False pretenses is often confused with larceny or embezzlement. "Embezzlement" is the wrongful appropriation or conversion of property where the original taking was *lawful* or *with consent* of the owner. If

---

[57]Bank error in returning check; funds withdrawn by someone else; account attached by legal proceedings; deposit charged back for unpaid check or draft, or similar matters.

[58]See Odom v. State, 130 Miss. 643, 94 So. 233 (1922), *Sugg. error overruled* 132 Miss. 3, 95 So. 253 (1923); 35 A.L.R. 391 (1925); 43 A.L.R. 51 (1926); 95 A.L.R. 501 (1935).

[59]Hinman v. State, 179 Miss. 503, 176 So. 264 (1937).

[60]Blakeney v. State, 216 Miss. 211, 62 So. 2d 313 (1953).

the original taking was affected by fraud it was unlawful.[61]

"Larceny" is the crime by which one obtains the possession of, but not the title to, property from another by means of false pretense, and with the intention to convert it to his own use. If the owner is parting with the property invests the recipient with the title thereto, as well as possession thereof, the crime is false pretenses. It will thus be seen that the passing of title constitutes the line of demarcation between larcey and false pretense.[62]

"In order to establish the crime of false pretenses, the pretense must be a representation as to an existing fact or past event, and not as to something to take place in the future; and it must be a representation as to a material fact. . . . The falsity of the representation is a part of the corpus delicti of obtaining property under false pretenses, and the falsity of the representation must be proved by evidence aliunde the confession."[63] A confession alone is insufficient without other proof.

A material element of the offense of obtaining money under false pretenses is that the false pretense must have been relied upon by the defrauded party.[64] "It is not sufficient to sustain an indictment for obtaining money under false pretenses to prove merely that a representation was false in fact, but the proof must show that the statement was known to be false by the person making it, or he must state the fact in such way as to carry assurance to the party that he is dealing with that the representation is true of his [the maker's] knowledge. . . ."[65] and the representation must have been the efficient cause of the money being paid to such party.

The other two Mississippi statutes relate to attempts. "The crime of attempting to obtain money or property by false pretenses is complete wherever the false representation is made with the requisite criminal intent under circumstances such that if the thing of value is obtained, a deprivation is the result. . . ."[66] In rare instances, a conviction for an attempt might be had, even where the accused has received part of the thing of value which he sought. This is probably prohibited in Mississippi, as there are separate crimes for an attempt to commit an offense and for the crime itself. A person can not be convicted of an attempt to obtain money or property by false pretenses unless he has actually made representations to the persons from whom the property or money is intended to be obtained, or to such

---

[61]Jones v State, 223 Miss. 812, 79 So. 2d 273 (1955), *cert. den.* 350 U.S. 869, *rehearing denied* 350 U.S. 919 (1955).

[62]Courtney v. State, 174 Miss. 147, 164 So. 227 (1935).

[63]Button v. State, 207 Miss. 582, 587, 42 So. 2d 773, 774 (1949).

[64]Breland v. State, 222 Miss. 792, 77 So. 2d 300 (1955).

[65]King v. State, 124 Miss. 477, 483, 86 So. 874, 876 (1921). A case dealing with a real estate agent listing land for sale.

[66]22 Am. Jur. *False Pretenses* § 80 (1939).

persons' agent. While it may be said to be the general rule that the completed crime of obtaining money or property under false pretenses can not be established unless it appears that the person alleged to have been defrauded believed the false pretense to be true and was deceived —a distinction is drawn between the completed crime and the attempt to commit it, the rule being established that the offense of attempting to obtain money or property under false pretenses may be committed although the prosecuting witness knew that the pretenses were false, or irrespective of whether they were true or false, did not rely on them.[67]

The two statutes in MISS. CODE ANN. (1956), are as follows:

> Sec. 2017. Attempt to commit offense—how punished.
>
> Every person who shall design and endeavor to commit an offense, and shall do any overt act toward the commission thereof, but shall fail therein, or shall be prevented from committing the same, on conviction thereof, shall, where no provision is made by law for the punishment of such offense, be punished as follows: If the offense attempted to be committed be capital, such offense shall be punished by imprisonment in the penitentiary not exceeding ten years; if the offense attempted be punishable by imprisonment in the penitentiary, or by fine and imprisonment in the county jail, then the attempt to commit such offense shall be punished for a period or for an amount not greater than is prescribed for the actual commission of the offense so attempted.
>
> Sec. 2018. Attempt to commit offense—no prosecution for if offense completed.
>
> A person shall not be convicted of an assault with intent to commit a crime, or of any other attempt to commit an offense, when it shall appear that the crime intended or the offense attempted was perpetrated by such person at the time of such assault or in pursuance of such attempt.

There is no Mississippi case wherein the defendant was charged with an attempt to commit false pretenses by an attempt to pass a bad check.

B. Federal Statute

Perhaps a starting point in discussing coverage by Federal law of ordinary personal checks is the National Stolen Property Act, 18 U.S.C. Sec. 2314 (1957), which in pertinent part punishes one who causes interstate transportation of "falsely made, forged, altered, or counterfeited securities," knowing the same to have been falsely made, forged, altered, or counterfeited.

Inasmuch as the Department of Justice's view is that responsibility for prosecuting "bad check" cases rests primarily with local authorities, the Department's policy is to avoid federal prosecution

---

[67] *Ibid.*

of such cases under section 2314 in the absence of exceptional circumstances, such as: that successful prosecution in a state is precluded by lack of evidence or absence of witnesses from the state; that the defendant is known to have passed checks in many jurisdictions; that the defendant's acts do not violate state law; that the punishment which the state could impose would appear inadequate in view of the frequency and scope of the defendant's activities; or that the charge is to be brought in conjunction with other Federal charges.

Prosecution under this statute is not instituted where a valid check contains a forged endorsement, as the forgery of an endorsement on a government check did not make the check itself a forged instrument within 18 U.S.C. Sec. 495 (1957).[68] By analogy, the same reasoning indicates that forgery of an endorsement of a personal check does not make the check a forged or falsely made security within the meaning of section 2314.[69]

With regard to interstate transportation, a violation obviously occurs when a person himself transports or carries the forged check interstate. Moreover, a violation occurs when the maker of the forged check who negotiates or cashes it in one state causes the check to be transported in the collection process to the bank in another state on which the check is drawn. In such a situation, the forgoing drawer is chargeable with knowledge or foreseeability that the check will travel interstate to the bank on which it is drawn.[70]

The most difficult questions arising under the statute involve determining whether forgery or false making has occurred within the meaning of the statute in regard to a particular check. It has been held that a "true name" check is not falsely made or forged under section 2314. That is to say, a check signed by the maker in his own true name, drawn on a bank in which he has insufficient funds or in which he has no account, is not forged or falsely made.[71] The reasoning which leads to this result is that forgery comprehends falsity in the execution or making of the instrument, rather than the falsity of any facts set forth in the instrument. Such a check is regarded as genuine in its execution, but containing a false statement of fact that the maker has a certain amount of funds on deposit in the bank. It has even been held that a "true name" check drawn on a non-existent bank is not forged under this statute.[72]

The essence of forgery is the making of the check with intent that

---

[68]Prussian v. United States, 282 U.S. 675 (1931).

[69]Streett v. United States, 331 F.2d 151 (8th Cir. 1964).

[70]Pereira v. United States, 347 U.S. 1 (1954); United States v. Sheridan, 329 U.S. 379 (1946).

[71]Greathouse v. United States, 170 F.2d 512 (4th Cir. 1948); United States v. Greever, 116 F. Supp. 755 (D.D.C. 1953).

[72]Melvin v. United States, 316 F.2d 647 (7th Cir. 1963).

it be received as the act of one other than the party signing it.[73] There is forgery where a signature is presented as the signature of another who is actually fictitious.[74] It is forgery to impersonate another by the signature, even though both persons have the same name.[75]

There is no forgery or false making where one draws a check as maker in his true name or a name by which he is commonly known,[76] or a name by which he is known to the payee,[77] and thus the use of a fictitious name does not in itself necessarily constitute forgery. However, the drawing of a check by one as maker in a fictitious name has been held to be forgery where the name is presented as the name of another or where the maker creates a fictional person with characteristics, personality, and a semblance of identity, and fraudulently uses the ficititious name to impersonate the fictional person.[78]

It might be pointed out that the cashing of worthless checks in connection with use of the mails in furtherance of a continuing scheme to defraud, involving as an integral part thereof the delay necessary in transmitting the checks to the drawee for payment, may consitute a prosecutable violation of the Mail Fraud Statute, 18 U.S.C. Sec. 1341 (1957), provided there is a sufficiently large number of mailings within a particular judicial district.[79]

VIII. Malicious Prosecution

One of the biggest problems confronting merchants and the public in general is the attempt to collect on a "bad check." When a check is returned from the bank, the merchant primarily wants his money. If the check in question is covered by the bad check law, a criminal and civil liability arises; otherwise, only a civil liability exists. The merchant normally exhausts all possible remedies to collect the check before turning the case over to the state for prosecution. The acts of

---

[73]American State Bank of Omaha v. Mueller Grain Co., 15 F.2d 899 (7th Cir. 1926), *rev'd on other grounds* 275 U.S. 493 (1928).

[74]Edge v. United States, 270 F.2d 837 (5th Cir. 1954); Hubsch v. United States, 256 F.2d 820 (5th Cir. 1958); Milton v. United States, 110 F.2d 556 (D.C. Cir. 1940).

[75]White v. Van Horn, 159 U.S. 3, 17-8 (1895); United States v. National City Bank of New York, 28 F. Supp. 144 (S.D.N.Y. 1939); Peoples Bank and Trust Co. v. Fidelity and Casualty Co., 231 N.C. 510, 57 S.E.2d 809 (1950).

[76]United States v. Gallaher, 94 F. Supp. 640 (W.D. Penn. 1950).

[77]United States v. Greever, 116 F. Supp. 755 (D.D.C. 1953).

[78]*Compare* Edge v. United States, 270 F.2d 837 (5th Cir. 1959) *with* Cunningham v. United States, 272 F.2d 791 (4th Cir. 1959); See Stinson v. United States, 316 F.2d 554 (5th Cir. 1963) which distinguishes between "forged" and "falsely made."

[79]United States v. Sampson, 371 U.S. 75 (1962); United States v. Kuiken, 101 F. Supp. 929 (W.D. Texas 1951).

the merchant, in attempting to collect on the check, can amount to malicious prosecution.

The law is clear in Mississippi that the instituting of a prosecution for the purpose of aiding in the collection of a debt is for an improper purpose and, therefore, a "malicious prosecution." Further, the institution of criminal proceedings under the bad check law renders the prosecution malicious, where the check was issued for goods already delivered, nothwithstanding that such transactions were completed at previous hours of the day on which the check was issued.[80]

The essential elements of a malicious prosecution suit are (1) malice, (2) want of probable cause, and (3) determination of the former proceedings[81] in favor of the defendant.

A. Malice

"The term 'malice' in the law of malicious prosecution means that the prosecution was instituted primarily because of a purpose other than that of bringing an offender to justice."[82] In an action for malicious prosecution, the jury has the right to consider, on the issue of malice, the defendant's reliance on advice of counsel and whether he made a full and fair disclosure to counsel.[83] The principal can be liable for the acts of its agents. Moreover malice or wantonness was held established in a malicious prosecution where a corporation through its acting general manager instituted a criminal prosecution under the bad check law when the check was issued for goods delivered prior to the issuance of the check. In fact, if the injured party or its agent signs a blank affidavit for prosecution under the bad check law and sends the affidavit to a justice of the peace who then institutes the prosecution, the justice of the peace becomes the agent of the complaining party. The complaining party or the justice of the peace can be held responsible in a malicious prosecution action.[84]

It is a practice in some other states for the district attorney or county attorney to write persons issuing bad checks a letter, requesting the check be paid in lieu of the issuance of a criminal affidavit. This practice results in the recovery of considerable money for people who otherwise would be defrauded. However, the district attorney and county attorney in Mississippi are required by law to prosecute any case coming within their purview under the bad check law. A letter

---

[80]Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 151 So. 743 (1934).

[81]Edmunds v. Delta Democrat Publishing Co., 230 Miss. 583, 93 So. 2d 171 (1957); Brown v. Kisner, 192 Miss. 746, 6 So. 2d 611 (1942).

[82]Rhodes v. Roberts, 223 Miss. 580, 586, 78 So. 2d 614, 617 (1955).

[83]Brown v. Watkins, 213 Miss. 365, 56 So. 2d 888 (1952)..

[84]State v. United States Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697 (1953); Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 151 So. 743 (1934). Neither a justice of the peace nor any other official can use the color of his office in aid of a collection agency.

to an accused party issuing the check to collect the check would be tantamount to extorting the amount of the check and the threat may amount to malicious prosecution.[85]

"The principal is liable for the act of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment."[86]

B. Probable Cause

Want of probable cause is the second necessary element to establish a malicious prosecution action. "Before probable cause can exist, there must be a concurrence of (1) an honest belief in the guilt of the person accused, and (2) reasonable grounds for such belief."[87] Both are essential to establish malicious prosecution.

Where the facts charged *do not* amount to a criminal offense, the charging party is not protected in a malicious prosecution action by proving the *truth thereof* nor by proving that *he believed that the facts charged constituted a criminal offense.*[88] The belief, however honestly entertained, that certain existing facts constitute a crime, which in reality do not constitute a crime, does not justify the institution of a criminal prosecution against another person and will not shield the person bringing the prosecution from liability. A mistaken belief regarding the facts may furnish probable cause for instituting criminal proceedings; but a mistaken belief concerning the legal consequences of a person's conduct does not furnish probable cause, unless based on the advice of counsel. A person acting in good faith on the advice of an attorney at law in instituting proceedings against another is immune from a malicious prosecution action. This generally does not apply to a person who has followed the advice given by a magistrate, justice of the peace, clerk of a court, or a layman.[89] In order for the defendant to claim as a defense that he acted upon the advice of counsel, it must clearly appear that the party acted in good faith upon such advice and made a full disclosure to his attorney.[90]

Apparently, the current rule in Mississippi concerning one who institutes criminal proceedings against another is that he has probable cause if he (1) *reasonably believes* that the accused person has acted, or failed to act, in a particular manner, and (2) *correctly believes* that the acts, or omissions, constitute, at common law or under an existing statute, the offense charged against him, or mistakenly so believes in

---

[85]Att'y Gen. Op., Feb. 5, 1965.

[86]Fisher v. Westmoreland, 101 Miss. 180, 188, 57 So. 563, 564 (1911).

[87]Harvill v. Tabor, 240 Miss. 750, 755, 128 So. 2d 863, 865 (1961).

[88]State Life Ins. Co. v. Hardy, 189 Miss. 266, 195 So. 708 (1940).

[89]Brown v. Kisner, 192 Miss. 746, 6 So. 2d 601 (1942).

[90]Kehl v. Hope Oil Mill & Compress Co., 77 Miss. 762, 27 So. 641 (1900).

reliance on the advice of counsel. When the facts charged do not amount to a criminal offense, the party making the charge is not protected in a malicious prosecution action by proving the truth thereof, nor by proving he believed that the facts constituted a crime.[91]

C. Termination of Criminal Proceedings

The third material element in a cause of action for malicious prosecution is the termination of the prosecution complained of in favor of the defendant. Without such termination no cause of action comes into existence.[92] If the termination is brought about by settlement, compromise, or agreement of the parties, then it is not a termination in favor of the defendant, and malicious prosecution will not lie. For instance, if the party accused and arrested voluntarily paid the court costs and the money due the prosecuting witness and requested dismissal of the charges against him, and the charges are in fact dismissed, it was held that there was no duress by virtue of the criminal charges, and the criminal proceeding was dismissed by settlement, compromise, or agreement.[93] However, if the accused pays the check and costs rather than go to jail or post bond, and he does so under protest, there is no "free choice"; there is coercion, and there is no settlement or compromise.[94]

Where the district attorney dismisses the prosecution on the request of the person at whose instance the prosecution was instituted, there is an inference that the private prosecutor had no probable cause for instituting the proceedings.[95] This rule would also apply if the prosecuting witness never appears before the grand jury in support of his criminal affidavit.[96]

Normally, a person testifying before the grand jury would not be liable in a malicious prosecution suit when it does not appear that he made an effort to procure the indictment. However, where, by means of a grand jury investigation, a witness corruptly or oppressively brought about the indictment and prosecution of another, maliciously and without probable cause, he is guilty of malicious prosecution.[97]

An acquittal when tried on an affidavit charging a crime is prima facie evidence that the prosecution was instituted with malice and

---

[91]Brown v. Kisner, 192 Miss. 746, 6 So. 2d 611 (1942); State Life Ins. Co. v. Hardy, 189 Miss. 266, 195 So. 708 (1940); Odom v. Tally, 160 Miss. 797, 134 So. 163 (1931).

[92]Grenada Bank v. Petty, 174 Miss. 415, 164 So. 316 (1935).

[93]*Ibid;* Jones v. Donald Co., 137 Miss. 602, 102 So. 540 (1925).

[94]State v. United States Fidelity & Guaranty Co., 217 Miss. 576, 64 So. 2d 697 (1953).

[95]Gunter v. Reeves, 198 Miss. 31, 21 So. 2d 468 (1945).

[96]Gandy v. Palmer, 169 So. 2d 819 (Miss. 1964).

[97]Winters v. Griffis, 233 Miss. 102, 101 So. 2d 346 (1958).

without probable cause, and amounts to a dismissal of the charges in favor of the accused.[98]

The rule on a conviction is different. Generally, there are three lines of cases dealing with the effect of a judgment of conviction on the question of probable cause for instituting the prosecution: (1) it is conclusive evidence of probable cause; (2) it is conclusive evidence of probable cause, unless the conviction was obtained by fraud, perjury, or other corrupt means; (3) it is only prima facie evidence of probable cause and may be rebutted by any competent evidence which clearly overcomes the presumption that arises from the fact of the defendant's conviction.[99] The Mississippi Supreme Court has unhesitatingly declined to follow the first line of cases. They have not yet ruled which of the other two lines they will follow. It is submitted that the second line of cases should be followed, as it is the majority rule and is the rule adopted in the RESTATEMENT OF TORTS. Mississippi holds that an acquittal is prima facie evidence of malice. Therefore, a conviction evidencing proof beyond a reasonable doubt, should be conclusive evidence of probable cause in the absence of fraud, perjury, or other corrupt means.

D. Defenses

The defendant may show, in a malicious prosecution suit, that he consulted an attorney, the district attorney, or county attorney, to show that he had probable cause and that no malice was involved in instituting the criminal proceedings. If it is shown that the defendant divulged true, full, and fair statements of facts to his attorney and that the prosecution was instituted in good faith, on the advice of his attorney, this is a complete defense to a charge of malicious prosecution.[100]

In the trial of a malicious prosecution suit, a verdict should be directed for the defendant if, on the evidence, the court can peremptorily say: (1) the original defendant was guilty of a crime for which he was prosecuted; or (2) the defendant instituted the prosecution without malice and with probable cause.[101] The court should also direct a verdict if it can be peremptorily said that the defendant made a true, full, and fair statement of facts to his attorney, if he acted in reliance on the attorney's advice, and if the prosecution was instituted in good faith.[102]

---

[98]Priest v. Avent, 236 Miss. 202, 109 So. 2d 643 (1959); State Life Ins. Co. v. Hardy, 189 Miss. 266, 195 So. 708 (1940); Whitfield v. Westbrook, 40 Miss. 311 (1866).

[99]Brooks v. Super Service, 183 Miss. 833, 185 So. 202 (1938).

[100]Pulliam v. Ott, 246 Miss. 739, 150 So. 2d 143 (1963).

[101]Priest v. Avent, 236 Miss. 202, 109 So. 2d 643 (1959); State Life Ins. Co. v. Hardy, 189 Miss. 266, 195 So. 708 (1940); Berry v. Priddy, 126 Miss. 125, 88 So. 517 (1921).

[102]Pulliam v. Ott, 246 Miss. 739, 150 So. 2d 143 (1963).

A case of false arrest or malicious prosecution in Mississippi can be such as to call for infliction of punitive or exemplary damages.[103] When, contrary to constitutional safeguards, creditors resort to criminal processes and to arrests under criminal charges for collection of their debts, the court will not be overly diligent in interfering with amounts of damages fixed by juries in malicious prosecutions.[104]

An honest belief that a crime has been committed is not a complete defense to a suit for malicious prosecution but such belief may be taken into consideration in mitigation of punitive damages, if any should be awarded.[105]

IX. Conclusion

One of the most serious problems confronting a law enforcement agency today is that involving bad checks. Traffic in forgery and worthless checks is on the upswing in the entire country, and the annual loss due to fraudulent checks now exceeds $500 million per year. Every prosecutor knows that the number of worthless checks and forgeries coming to his office has increased considerably in the past several years, and that this is one of the toughest problems to cope with. This is probably the most frequently recurring crime in the country today and is due in a large measure to the current manner of doing business in the United States, as compared with prior years. This has brought about a whole new area for invasion by the criminal. Generally, the offense does not come to the attention of the authorities for some time after its commission. The local merchant, after being informed that he has a bad check, usually likes to contact the person first and give him an opportunity to make the check good before turning it over to the authorities. Carelessness on the part of those accepting checks is what keeps the bad check passer in business. If we are to combat this type of crime effectively, the general public and the law enforcement officers must work closely together. There must be a willingnes to prosecute the offender.

Approximately 25% of those serving time in our penal institutions are there because of bad checks. 86% of those seving time in our penal institutions for bad checks have had prior convictions. It is, therefore, apparent that the bad check problem is an economic problem for the merchant and the taxpayer as well. A reduction in the number of bad checks would benefit the merchant, the taxpayer, and society in general.

It has been the writer's experience that too few persons know or understand what constitutes a bad check under the bad check law. Perhaps this paper will answer some of the questions which have perplexed the prosecutor, the attorney, and the layman.

---

[103]Atkinson v. Dixie Greyhound Lines, 143 F.2d 477 (5th Cir. 1944), *cer. den.* 323 U.S. 758 (1944); Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 151 So. 743 (1934).

[104]Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 151 So. 743 (1934).

[105]Brown v. Kisner, 192 Miss. 746, 6 So. 2d 611 (1942).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR
MEMBER, NATIONAL CONFERENCE OF LAW REVIEWS
MEMBER OF SOUTHERN LAW REVIEW CONFERENCE

VOLUME XXXVII DECEMBER 1965 NUMBER 1

THE LAW JOURNAL EDITORIAL BOARD

JAMES W. BURGOON, JR.
Editor-in-Chief

A. VINCENT BLACKWELL
Assistant Editor

NICK A. MAVAR, JR.
Article Editor

JAMES W. O'MARA
Casenote Editor

DON PRESTON LACY
Comment Editor

ROBERT A. WEEMS
Index and Review Editor

JAMES S. GEORGE
GUTHRIE TURNER ABBOTT
Research Editors

E. CLIFTON HODGE, JR.
Business Manager

PARHAM H. WILLIAMS, JR.
Faculty Advisor

THE LAW JOURNAL STAFF

Jesse Murray Akers
Leonard Adam Blackwell
Wade H. Creekmore, Jr.
Floyd Millard Davis
George Marion Fleming
Robert Charles Galloway
John G. Gourlay, Jr.
William B. Harvey
Scott Parker Hemleben
David R. Hunt
Bill P. Joyner
Robert C. Khayat
Howard Owen Leach
Frank T. Moore, Jr.
George Harold Noe
William M. Rainey
Arthur Earl Ray, Jr.
John Michael Sims
Michael B. Taylor
Frank Snider Thackston, Jr.
Robert Upchurch
Samuel H. Wilkins
Roy C. Williams

The JOURNAL seeks to print matter of merit and interest; being desirous of offering freedom to contributors, it assumes no responsibility for the views expressed herein.

STUDENT COMMENTS

AN EXAMINATION OF VARIOUS ASPECTS OF INTESTATE SUCCESSION IN MISSISSIPPI

I. Introduction

Though it would be ideal if every one would leave a will directing exactly how he wishes his estate to be distributed, this is not done in many instances. It therefore becomes necessary to keep informed with the statutes on descent and distribution and the interpretations that the court makes as to their effect. This comment does not purport to cover every aspect of the laws of intestacy. What has been attempted is to deal with five major areas which have received most of the attention in regard to the death of one without a will. These areas include the subjects of advancements, half-bloods, illegitimates, unworthy heirs, and adoption. An attempt will be made to survey the statutes and the cases that have construed or interpreted these statutes and to ultimately reach a conclusion as to the soundness of the laws of intestacy in Mississippi today.

II. Advancements

A. Introduction

An advancement is the transfer of real or personal property from a parent, during his lifetime, to any of his children with the intention that such transfer will be taken as part of that child's share in case the transferor should die intestate. The child has the choice of bringing this share into hotchpot with the rest of the estate, and he may then acquire the remainder of his due portion of the intestate property by deducting that which he has previously been advanced. The doctrine of advancements is fundamentally one of equity. It is based upon the idea that the parent, who dies wholly intestate, desires his children to take equally where he has given some of them something by way of anticipation of inheritance.

Section 475 of the Mississippi Code controls Mississippi's application of the doctrine of advancements. This doctrine is only applicable in a situation where the person who transfers the property dies intestate. It does not apply where the ancestor dies wholly testate or even where he dies leaving some property that would descend as partial intestacy.

B. Intention

To constitute an advancement the intestate must irrevocably divest

himself of all the interest in the property,[1] and the complete title to the property must pass with the beneficial interest vesting in the child during the lifetime of the parent.[2] It must satisfactorily appear that the intestate intended that the property which he gave to his child was given as an anticipation of a portion of the child's share of the donor's estate.[3] Aside from the statute, the donor's intention at the time of the transfer is the controlling principle so that whatever the donor intended to be an advancement should be so considered regardless of the manner by which it was made or the manner of its actual enjoyment.[4] The fact that the child does not regard the transfer as an advancement is immaterial.[5] The controlling factors in the determination of the subjective intent of the intestate are the circumstances surrounding the transaction at the time the transfer was made.[6]

In determining the intention of the intestate, the purpose for which the transaction was made is an influencing element.[7] A rebuttable presumption arises that the intestate intended an advancement in certain circumstances. Of course, in all of these instances compliance with the statute and other prerequisites must be evident before the presumption arises, and the presumption may be overcome where a contrary intent of the ancestor is proven. Where the purpose of the transfer was to set the child up in life, it is clear that the transfer will be held an advancement rather than a gift.[8] The same is true where property is given to aid a child in a business or profession.[9] Some authority gives rise to the presumption that an advancement was intended where property was given to the daughter as a marriage portion.[10] The payment by a parent in order to discharge a child's debt to a third person is ordinarily considered an advancement in the absence of evidence showing that it was meant as a loan or a gift.[11]

In other aspects the contrary presumption prevails. Expenditures in the course of normal parental duties,[12] such as expenses for elementary

---

[1]McClellan v. McCauley, 158 Miss. 456, 467, 130 So. 145, 148 (1930); Greene v. Greene, 145 Miss. 87, 111, 110 So. 218, 222 (1926); Crosby v. Covington, 24 Miss. 619, 620 (1852).

[2]McClellan v. McCauley, 158 Miss. 456, 467, 130 So. 145, 148 (1930); Greene v. Greene, 145 Miss. 87, 111, 110 So. 218, 222 (1926).

[3]See Greene v. Greene, 145 Miss. 87, 106, 110 So. 218, 220 (1926).

[4]Wilson v. Beauchamp, 50 Miss. 24, 29 (1874).

[5]Barron v. Barron, 181 Ga. 505, 182 S.E. 851, 853 (1935).

[6]See Greene v. Greene, 145 Miss. 87, 111-12, 110 So. 218, 222 (1926); Wilson v. Beauchamp, 50 Miss. 24, 29 (1874).

[7]ATKINSON, WILLS 719 (1953) [hereinafter cited as ATKINSON].

[8]*E.g.*, Dent v. Foy, 210 Ala. 475, 98 So. 390, 394 (1923).

[9]*E.g.*, Page v. Elwell, 81 Colo. 73, 253 Pac. 1059, 1064-65 (1927).

[10]Whitfield v. Whitfield, 40 Miss. 352, 368-69 (1866). See also Wenbert v. Lincoln Nat'l Bank & Trust Co., 116 Ind. App. 31, 61 N.E.2d 466 (1945).

[11]*E.g.*, Huffman v. Ramey, 157 Tenn. 183, 185, 15 S.W.2d 746, 747 (1928).

[12]See Greene v. Greene, 145 Miss. 87, 112, 110 So. 218, 222 (1926).

education,[13] are not considered advancements. This is generally true of secondary, collegiate, and professional education;[14] however, there is some authority to the contrary.[15] This division of authority depends upon whether or not the parent intended the expenses so incurred to be considered as advancements. Also, where the parent is indebted to the child[16] or where there is sufficient consideration given for a transfer,[17] there is no presumption of an advancement.

C. Applicability of the Doctrine

The Mississippi statute specifically states that the doctrine of advancements is applicable only to the children of the intestate or their descendants.[18] Transfers from the ancestor to the grandchildren during the lifetime of their parents are generally held to be gifts rather than advancements,[19] but it may be considered an advancement where the parent is dead at the time of the transfer.[20] Furthermore, it is clear in Mississippi that the doctrine of advancements may not be invoked by a widow. It was expressly stated in *Jackson v. Jackson*[21] that the widow was not entitled to have the advancements made by her deceased husband during his lifetime collated for her benefit. She is only entitled to what remains from the distribution of her husband's estate, exclusive of any advancements.[22]

Though there is no case in Mississippi which is in point, most jurisdictions find that an advancement may be made to a child by the transfer of property or money to the spouse of the child where the intestate intends such transfer to be considered as an advancement, especially where the child acquiesces.[23] This may even be true where the child has died but prior to his death recognized that a transfer to his spouse would be considered as an advancement.[24]

D. Per Stirpes or Per Capita

A somewhat more difficult problem arises where a parent who has received an advancement dies prior to the death of the intestate grandparent and has left issue surviving him. In some jurisdictions a ques-

---

[13]Garrett v. Colvin, 77 Miss. 408, 412, 26 So. 963 (1899).

[14]*Cf., Ibid.*

[15]*E.g.*, Garrett v. Colvin, 77 Miss. 408, 412, 26 So. 963 (1899).

[16]*E.g.*, Fennell v. Henry, 70 Ala. 484 (1881).

[17]*E.g.*, Beakhust v. Crumby, 18 R.I. 689, 30 Atl. 453, 31 Atl. 753 (1894).

[18]Miss. Code Ann. § 475 (1956).

[19]Stevenson v. Martin, 74 Ky. (11 Bush.) 485, 493 (1875).

[20]Wolfe v. Galloway, 211 N.C. 361, 365, 190 S.E. 213, 215 (1937). *But see In re* Willmott's Estate, 211 Iowa 134, 230 N.W. 330 (1930).

[21]28 Miss. 674, 682 (1855).

[22]Whitley v. Stephenson, 38 Miss. 113, 116 (1859).

[23]*E.g.*, Sadler v. Huffhines, 11 Ky. L. Rep. 670, 12 S.W. 715 (Ct. App. 1889).

[24]Barber v. Taylor, 39 Ky. (9 Dana) 84, 86-87 (1839).

tion arises as to whether the grandchildren are to take per capita or per stirpes upon the death of the intestate grandparent. In general, the answer would rest upon whether *all* of the grandparent's children have died prior to the grandparent or whether only *some* of the children have died prior to the grandparent. The general rule seems to be that where *all* of the children have died and leave issue, and such grandchildren are of equal kin, they will take in their own right and would therefore not be burdened with their parent's advancement.[25] This would be a distribution per capita. However, where the child dies leaving issue but other children of the intestate are still living and have children of their own at the time of the grandparent's death, the issue will take in their deceased parent's place, and any advancement will be deducted from their share of the grandparent's estate.[26] This is a per stirpes distribution.

In Mississippi sections 468 and 472 of the Code on descent of land and distribution of personalty would be controlling so that even where *all* of the children were dead prior to the intestate grandparent's death, the issue would take per stirpes, contrary to the general rule.[27] It appears that this produces the most equitable result and better carries out the purposes for which the advancement doctrine was created. As has been previously stated, the doctrine rests upon the presumed desire of the ancestor to equalize his estate among his heirs; so where a parent has received an advancement, the children of that parent should be required to account for their parent's advancement since the parent would have been so obligated if he were living at the death of the intestate. This comes closer to carrying out the desires of the intestate than would a per capita distribution. However, it is recognized that there are sound arguments for the general rule that the issue take per stirpes or per capita dependent upon whether or not all of the intestate's children are living at his death.

E. Partial Intestacy

The general rule is that the doctrine of advancements does not apply in cases of partial intestacy, since the doctrine relates only to the estate of an "intestate." Where a person leaves anything under a will, he is conclusively presumed to have considered any advancements in his calculations of the bequests or devises.[28] However, some jurisdictions

---

[25]Person's Appeal, 74 Pa. 121, 123 (1873).

[26]Adams v. Yancy, 105 Miss. 233, 242, 62 So. 229, 230 (1913).

[27]MISS. CODE ANN. §§ 468, 472 (1956). See also Adams v. Yancy, 105 Miss. 233, 62 So. 229 (1913) and Callicott & Norfleet v. Callicott, 90 Miss. 221, 234, 43 So. 616, 618 (1907). Though not directly in point, these two cases give support to the view that Mississippi would follow the per stirpes distribution in all instances. Particular attention should be given to the brief of appellant in the *Yancy* case.

[28]ATKINSON 724.

have statutes providing for the application of the doctrine to that portion of the estate that passes as intestate property.[29]

F. Hotchpot

It is a necessity in carrying out the doctrine of advancements to allow those persons who have received something by way of advancement to bring that property so advanced into hotchpot.[30] If a donee of an advancement wishes to share in the estate, he must bring whatever assets he was advanced from the intestate during his lifetime into hotchpot. This does not mean that he must literally bring in that which he received; what it does mean is that the donee must account for any advancement and deduct its value from the total amount that he is due from the intestate. It should be remembered that the statute states that both real and personal property may be brought into hotchpot and that the child or descendant "shall *choose* to come into the partition and distribution of the estate . . . ."[31] This means that a child, receiving an advancement from his father, cannot be compelled to bring that advancement into hotchpot where he does not claim any of his father's estate.[32] It should be noted that by bringing the property into hotchpot the child does not relinquish his title to the advancement but may bring it in merely to see whether it falls short of or exceeds his equal share of the estate.[33] The value of the property brought into hotchpot is determined by its value as of the time the advancement was made.[34]

G. Summary

In order to more easily understand how distribution of the estate is managed where advancements are brought into hotchpot and to summarize the working of the doctrine of advancements so as to equalize the shares distributed, the three following examples are helpful.

(1) Where a father X, during his lifetime, advances $1000 to his son A, $2000 to his son B, and nothing to his son C, what is the distribution of his estate totaling $12,000 if he dies intestate? First, one must compute the total advancements with the amount of the estate at X's death, which, when added, gives a total of $15,000. This leads one to conclude that each son is entitled to $5000, so that if they all come into hotchpot the distribution would be that A would receive $4000, B would receive $3000, and C would get $5000. This demonstrates that the sums advanced are figuratively brought into hotchpot and that the

---

[29] 3 Am. Jur. 2d *Advancements* § 12 (1962).

[30] Miss. Code Ann. § 475 (1956).

[31] *Ibid.*

[32] Phillips v. McLaughlin, 26 Miss. 592, 594 (1853).

[33] Jackson v. Jackson, 28 Miss. 674, 680-81 (1855).

[34] Greene v. Greene, 145 Miss. 87, 115, 110 So. 218, 223 (1926); Jackson v. Jackson, 28 Miss. 674, 681 (1855).

amounts each received by way of an advancement are deducted from the amount their share would have been if there had been no advancement.[35]

(2) During his lifetime a father X advanced $5000 to his son A, $1000 to his son B, and nothing to his son C. He later died intestate and left an estate valued at $2000. How is the estate distributed? It is rather obvious by making a hasty calculation that A would choose *not* to come into hotchpot, since his share advanced is above the entire estate left by X. Consequently, A and his advancement are disregarded in the calculation. B would bring his share into hotchpot making the total estate $3000, entitling both B and C to a share of $1500 each. Since B already received $1000 by way of advancement, his share of the estate is $500 and C would get the remaining $1500.[36]

(3) Much more complex is the situation where the widow is involved. The father X makes an advancement of $4500 to his son A, $400 to his son B, and nothing to his son C. He later dies intestate leaving these three sons and his widow W. The estate totals $6900. How is the estate distributed among the heirs? It should be observed that A would not choose to bring his $4500 into hotchpot, since that sum is greater than his equal share in the estate. For that reason, he is excluded from the remainder of the calculation.[37] The distribution of the wife's share is not included with the advancements,[38] so that she will take a child's share of the actual amount of the estate at the intestate's death. This would be an amount of $2300, since A is now excluded from the figuring. This would leave a sum of $4600 in the estate. B would choose to bring his $400 advancement into hotchpot so that the total would come to $5000. B would then receive $2100 after deducting his advancement, and C would obtain $2500 since he had no advancement.[39]

III. Half-Bloods

A. Introduction

A half-blood is the relationship between two individuals who are born of either the same mother or the same father but not of both parents in common.[40] Some difficulty arises in attempting to solve problems of descent of property to half-bloods, especially where the intestate's kindred of the half-blood are of equal degree in relationship to kindred of the whole blood.

There are very few cases in Mississippi in regard to descent and

---

[35] Atkinson 717.

[36] Atkinson 717-18.

[37] See Norfleet v. Callicott, 90 Miss. 221, 232-33, 43 So. 616, 618 (1907).

[38] Jackson v. Jackson, 28 Miss. 674, 682 (1855).

[39] See Person's Appeal, 74 Pa. 121 (1873).

[40] Atkinson 50.

distribution to half-bloods. The cases which have arisen in this area are usually controlled by the Mississippi statute on half-bloods which is section 469 of the Mississippi Code. This section provides that there shall be no distinction between kindred of the whole blood and kindred of the half-blood, except where the kindred of the whole blood and half-blood are of equal degree. In such an instance the whole blood kindred take to the total exclusion of the half-blood. This statute is an improvement over the common law rule toward half-bloods, for under the common law of descent the kindred of the half-blood were absolutely excluded.[41] However, section 469 still adheres to the idea of extreme favoritism of the intestate's nearest of kin over half-bloods of the same degree to the extent of excluding half-bloods. This demonstrates that the common law doctrine of total disregard toward half-bloods of an ancestor is still influencing Mississippi's statutory application to whole bloods and half-bloods of equal degree. The modern trend is toward giving the half-blood something though he may be in equal degree of kindred with the whole bloods to the intestate.

B. Mississippi's Application

There are many cases arising in the United States in regard to descent of ancestral property to the half-blood,[42] but these cases are not applicable in Mississippi since Mississippi makes no distinction between the descent and distribution of ancestral (real) property and personal property.[43] Distribution of property to whole bloods and half-bloods is usually determined by the controlling statute of the particular jurisdiction. But it has been found that most jurisdictions in which no statute governs now allow the half-blood to take equally with the whole blood, basing this rule either on the intent of the legislature as gathered from the other statutes of descent and distribution or upon the theory that the common law originated with the feudal law and is not applicable to American institutions.[44]

The first case in Mississippi expressly establishing a distinction between this state's application of the doctrine of half-bloods and that of the common law is *Fatheree v. Fatheree*.[45] The court in that case recognized that at common law the kindred of the half-blood were excluded from inheriting real property, but it pointed out that our statute has changed this common law view and that in Mississippi both real

---

[41]Comment, 42 YALE L.J. 101, 102 (1932).

[42]For a cumulative coverage of cases on descent of ancestral property see Annot., 141 A.L.R. 976 (1942).

[43]See MISS. CODE ANN. §§ 468, 472, (1956).

[44]16 AM. JUR. *Descent and Distribution* § 62 (1958); Annot., 141 A.L.R. 976-77 (1942).

[45]1 Miss. (Walker) 311 (1828).

and personal property may descend to a half-blood.[46] Collaterals, such as brothers and sisters, of the whole blood are preferred to those of the half-blood; but where there are none of the whole blood, then the half-blood collaterals shall inherit.[47]

Following this case it became well established that where there were brothers and sisters of the whole blood, they would take to the total exclusion of brothers and sisters of the half-blood of equal degree.[48] This is true even as to descendants of brothers and sisters of the whole blood who will take to the exclusion of the intestate's sister of the half-blood.[49] The underlying principle is based upon our statute allowing a per stirpes distribution[50] since the descendants take through representation and therefore take to the exclusion of a half sister even though she is living at the time of the intestate's death.[51]

This doctrine of intestate succession to half-bloods was applied by the Mississippi Supreme Court where there was a will in which the testator provided that if his daughter died without issue of her body then the property devised to her would go to his brothers and sisters or their descendants.[52] The daughter died without issue causing the property to go to the brothers and sisters of the testate. The problem arose as to whether the brothers and sisters of the half-blood were to be included. The court determined that the term "brothers and sisters" meant both brothers and sisters of whole and of half-blood, but the court went on to find that the term "right heirs" as used in the statute respecting limitation on failure of issue meant those persons who would inherit property as heirs at law.[53] The court was in effect allowing the property to go over as intestate succession to the brothers and sisters; therefore the court held that the testator's brothers and sisters of the half-blood were not "right heirs" and a gift over to them jointly with the brothers and sisters of the whole blood made them third donees.[54] The brothers and sisters of the half-blood could not take since this would be a violation of our two donee statute.[55] The court seems to have taken the long way around in order to exclude the brothers and sisters of the half-blood. It is difficult to understand why the court did not simply look to the intention of the testator rather than applying intestate succession to a will.

---

[46]*Id.* at 312.

[47]*Ibid.*

[48]Hulme v. Montgomery, 31 Miss. 105, 106 (1856).

[49]Scott v. Terry, 37 Miss. 65, 70 (1859).

[50]Miss. Code Ann. § 468 (1956).

[51]Scott v. Terry, 37 Miss. 65, 68-70 (1859).

[52]Darrow v. Moore, 163 Miss. 705, 142 So. 447 (1932).

[53]*Id.* at 767, 142 So. at 452.

[54]*Id.* at 768, 142 So. at 453.

[55]Darrow v. Moore, 163 Miss. 705, 768, 142 So. 447, 453 (1932), referring to Code of 1906 § 2765 [Presently Miss. Code Ann. § 838 (1956)].

The determination by the court in regard to which relatives of the intestate are of equal degree causing half-bloods to be excluded should not be overlooked. In *Aycock v. Aycock*[56] the court applied the statute[57] in determining that where an unmarried intestate died without issue, his surviving parent would take to the exclusion of any brothers and sisters of the half-blood since the mother and father are of equal degree with brothers and sisters of an intestate. In a later case[58] the court concluded that it was obvious that first and second cousins are not of equal degree so that where there were no closer descendants of the intestate than a first cousin of the half-blood and a second cousin of the whole blood, the first cousin of the half-blood will take rather than the second cousin, because the statute expressly states that a half-blood will be preferred over a whole blood of lesser degree.

C. Conclusion

Mississippi's application of intestate succession to half-bloods appears to be harsh in some instances where the half-bloods and whole bloods are of equal degree. Section 469 regards the whole brothers and sisters as primary to the total disregard of the half brothers and sisters. In our society today it would seem that such total discrimination is somewhat unjust. In all practicality the children resulting from both marriages are brought up together. Both classes of children are common to one parent. To completely exclude the half-blood seems unfair and also contrary to what the intestate might have desired. Though the correct solution may not be to treat the half-blood and whole blood equally in distributing the estate, it seems only right that the half-blood should get some share of the estate rather than being totally excluded. The rule followed by Mississippi gives an undue preferment to the whole blood over the half-blood. It is suggested that this statute should be changed in order to more fairly and justly distribute the estate of a deceased who leaves kindred of equal degree, some of the whole blood and others of the half-blood.

Three types of statutes have evolved which establish the modern trend being followed by other jurisdictions in regard to half-bloods:

(1) The half-blood and whole blood are treated equally, allowing the half-blood to take an equal share with the whole blood.[59] Suppose an intestate dies leaving A, a kindred of the whole blood, and B, a kindred of the half-blood of equal degree with A. A and B are the rightful heirs of the intestate and under this ruling they would each take one half of the intestate's estate.

---

[56]119 Miss. 641, 81 So. 482 (1919).

[57]Code of 1906 § 1659 [Presently Miss. Code Ann. § 468 (1956)].

[58]Toomey v. Turner, 184 Miss. 381, 186 So. 301 (1939).

[59]*E.g.*, Ala. Code tit. 16, § 5 (1959); Neb. Rev. Stat. § 30-111 (1956); Okla. Stat. Ann. tit. 84, § 222 (1951).

(2) The half-blood is given a half share, or, put it another way, the whole blood takes twice as much as the half-blood[60] .Under this system if the whole brother A and the half brother B survive the deceased parent, A would take two thirds and B would take the remaining one third. This is giving the half-brother half as much as the whole brother.

(3) Finally, the property would be divided between collaterals as if the parents (or more remote ancestors) survived the intestate and then died without a will leaving the property to their respective descendants.[61] Suppose the intestate had left two descendants, A being a whole blood and B being a half-blood of equal degree to A. A would inherit one half of the common parent's share, which would be one fourth of the total estate, and also the entire share of the intestate's other parent which would give him a total of three fourths of the entire estate. B would inherit one half of the common parent's share which would give him one fourth of the entire estate.[62]

It is submitted that number two (2) above presents the most equitable and easily administered distribution. Adoption of such a statute in Mississippi would be a vast improvement over the present system.

IV. Illegitimates

A. Introduction[63]

At common law a bastard who married would stand in lawful relationship with his spouse and would establish a new line of descent as to the issue born of his marriage.[64] These lineal descendants would come within the general law of descent and distribution and could lawfully inherit from their illegitimate parent and he from them.[65] But at common law an illegitimate could not inherit from his own mother or other kindred, nor they from him, because it was believed that he had no inheritable blood and was without kin or ancestors.[66] This unfounded idea that a bastard could not inherit has been abrogated by statute in most jurisdictions.[67] Mississippi has such a statute.[68] This

---

[60]*E.g.*, Fla. Stat. Ann. § 731.24 (1963); 17A Tex. Rev. Civ. Stat. Ann. art. 41(b) (1956); 9 Va. Code Ann. § 64-2 (1950).

[61]*E.g.*, Iowa Code § 12025 (1962); Kan. Gen. Stat. Ann. § 59-509 (1949); N.M. Stat. Ann. § 29-1-1—1-4 (1953).

[62]For the basic source of these statutes see Atkinson, *Succession Among Collaterals*, 20 Iowa L. Rev. 185, 197-98 (1935).

[63]For a general treatise of the law of illegitimates and its application in each state of the United States see Note, 26 Brooklyn L. Rev. 45 (1959).

[64]Atkinson 81.

[65]*Ibid.*

[66]Taylor v. Jackson, 194 Miss. 441, 452, 12 So. 2d 144, 147 (1943).

[67]*Ibid.*

[68]Miss. Code Ann. § 474 (1956).

statute provides for the legitimation of children born out of wedlock by the subsequent marriage of the parents and acknowledgement by the father so that such children are capable of inheriting and transmitting inheritance as if born in wedlock. It further provides that all illegitimates shall inherit from their mother, her other children if she have any, and from her other kindred according to the statutes of descent and distribution. The children of an illegitimate and their descendants shall inherit from their uncles, aunts, and grandparents, but they cannot inherit from any ancestor or collateral kindred if there be any legitimate heirs of such ancestor or collateral kindred of equal degree who would otherwise be entitled to the estate. Finally, it is provided that the mother of an illegitimate, her other children, and her kindred, whether legitimate or illegitimate, shall inherit from a bastard according to the statutes of descent and distribution.

This statute provides for the unfortunate illegitimate child in a fairly liberal manner, and justifiably so, for the unlucky child should not have to suffer for circumstances which are beyond his control.

B. Half-Bloods and Illegitimates

The most illustrative case in pointing out the law in Mississippi in regard to illegitimates and half-bloods is *Taylor v. Jackson.*[69] The facts of the case were that the intestate died without heirs at law other than collateral kindred who were first cousins of the whole blood born of an illegitimate aunt of the intestate and first cousins of the half-blood who also came from illegitimate parents. The dispute was between the first cousins of the whole and half blood. The court found that sections 469 regarding half-bloods and 474 regarding illegitimates should be construed together[70] and held that the first cousins of the whole blood, despite the fact that they were born of an illegitimate, should take to the exclusion of the first cousins of the half-blood.[71] Since the statue on illegitimates provides that all illegitimates shall inherit from their mother and her kindred, and the statute on half-bloods provides that where a half and whole blood are of equal degree the whole blood takes to the exclusion of the half-blood, the first cousins of the whole blood were allowed to take the intestate property just as though they were born of a legitimate parent.

In an earlier case[72] the court determined that these two statutes should be construed in pari materia and, in so doing, held that the illegitimate son of a sister of the whole blood would take to the exclusion of legitimate children of a sister of the half-blood. From these two cases

---

[69]194 Miss. 441, 12 So. 2d 144 (1943).

[70]*Id.* at 451, 12 So. 2d at 147.

[71]*Id.* at 452, 12 So. 2d at 147.

[72]Davidson v. Brownlee, 114 Miss. 398, 75 So. 140 (1917).

it must be concluded that illegitimates of the whole blood are preferred in inheritance over half-bloods, whether legitimate or illegitimate, of the same degree. The court has allowed children of an illegitimate half brother of the intestate to inherit the estate where there were no kindred of the whole blood.[73]

An interesting question might arise as to whether an illegitimate half-blood would inherit in preference to a legitimate whole blood of a lesser degree in relationship to the intestate. It is believed that the court in construing these two statutes together would allow the illegitimate half-blood to inherit the estate to the exclusion of the legitimate whole blood of a lesser degree. An even more complicated question might arise as to whether a child of an illegitimate whole blood could inherit in preference to a child of a legitimate half-blood of the same degree. It appears that, if this hypothetical question should actually occur, the two statutes are in direct conflict on this point and the court would probably allow the two to share equally.

C. Legitimation

The Mississippi statute recognizes certain acts on the part of the parents to make legitimate a child born out of wedlock. Because there are certain restrictions in the statute in regard to bastards, it would be very important to an illegitimate to become subsequently legitimated so that he would be capable of inheriting and transmitting inheritance as if born in wedlock. In order that there might be a subsquent legitimation, the parents must afterward marry, and the child must be acknowledged by the father as his own.[74]

Hulitt v. Jones[75] clearly illustrates the law in Mississippi in regard to legitimation. After the birth of an illegitimate the parents were married; however, they obtained a divorce shortly thereafter. The court allowed the daughter to inherit as though she had been born in wedlock.[76] The court stated that the evidence must be clear, convincing, and unambiguous to support an acknowledgment by the father. It must consist of acts or conduct on the part of the father as well as declarations of acknowledgment,[77] but the acknowledgment by the father does not have to be specifically of the child's right to inherit nor does he have to perform the duties of a father as long as it is shown that he admits the child is his own.[78]

A decree of annulment does not normally affect the legitimacy of

---

[73]Malone v. Pope, 189 Miss. 46, 59, 196 So. 319, 322 (1940).
[74]Miss. Code Ann. § 474 (1956).
[75]220 Miss. 827, 72 So. 2d 204 (1954).
[76]*Id.* at 833, 72 So. 2d at 207.
[77]*Id.* at 832, 72 So. 2d at 206.
[78]*Ibid.*

a child born in wedlock.[79] In one case, however, where a child was born out of wedlock even though the father subsequently married the mother, the child was not allowed death benefits.[80] This particular holding was based upon the fact that the proof showed that the marriage was consummated under coercion and duress so that the chancellor declared the marriage void ab initio.[81] Therefore, there was no valid marriage and the child could not claim to be legitimated by section 474 of the Mississippi Code.[82]

Another Mississippi case[83] finding that a bastard had not been legitimatized did so upon the grounds that in order for the child to be legitimated it must be shown that he is the natural child of the father, that the parents were afterward lawfully married, and that the father acknowledged the child as his own. So, where it was shown that the child was born in another state prior to the marriage of the mother to the intestate, and the evidence being insufficient to show that the father acknowledged paternity, the child was not considered the legitimate offspring of the intestate and could not inherit as his sole heir.[84]

D. Inheritance By and Through Illegitimates

The two preceding divisions are illustrative of some examples of inheritance by and through illegitimates,[85] and the cases cited therein will not be repeated under this division. The statute very clearly states who may inherit from illegitimates as well as from whom illegitimates may inherit. This division is included merely to point out one remaining case which seems important in the field of inheritance of illegitimates.

McDaniel v. McDaniel[86] was a case in which an intestate left no wife or children surviving him. He was survived by a brother and the children of two of his sisters who predeceased him. The children of one sister were illegitimate. The lower court divided the estate between the other deceased sister's legitimate children and the surviving brother, excluding the illegitimate children. The supreme court reversed this decision and divided the intestate's estate into thirds allowing the illegitimate children to take their share of the estate. The court pointed out that the chancellor had misconstrued that part of the statute which provides that the *children of an illegitimate* shall not inherit if there be other legitimate heirs of equal degree to whom the estate would

---

[79]See Miss. Code Ann. § 2748-03 (1956). See also Ervin v. Bass, 172 Miss. 332, 160 So. 568 (1935).

[80]Stanford v. Stanford, 219 Miss. 236, 68 So. 2d 275 (1953).

[81]*Ibid.*

[82]*Id.* at 242, 68 So. 2d at 277.

[83]Thomas v. Thomas, 200 Miss. 96, 25 So. 2d 710 (1946).

[84]*Id.* at 102-03, 25 So. 2d at 710-11.

[85]See notes 69, 72, 73 *supra* and accompanying text.

[86]123 Miss. 401, 85 So. 113 (1920).

otherwise descend.[87] Here, the mother was legitimate; it was her children that were illegitimate. The statute plainly provides that these children, though illegitimate, should inherit from their mother or her kindred, which in this case was the mother's intestate brother. The court also allowed the mother's grandchildren, born of one of her deceased illegitimate children, to take their share of the one third since there were no legitimate heirs in the same degree who would otherwise inherit.[88]

E. Wrongful Death Action

Though not directly in point in a comment on inheritance, it is of interest to note that the court has held in two early cases that neither an illegitimate half sister[89] (closest of kin to the deceased) nor a mother of an illegitimate son[90] could bring an action in tort for the wrongful death of an illegitimate sister or son respectively. These two cases were decided on the basis that the former statute[91] on inheritance of illegitimates did not provide for any inheritance to a mother or her kindred from an illegitimate. In view of our present statute[92] giving such rights to the mother and her kindred, the court should and presumably would enforce the statute by allowing recovery if a similar instance occurred.

V. Unworthy Heirs

A. Introduction

The courts tend to allow an heir to inherit from the decedent regardless of the heir's misconduct toward the intestate.[93] Areas of misconduct on the part of heirs can generally be limited to three particular subjects: (1) where a parent has abandoned or denied his paternity of the intestate child; (2) where a claimant has feloniously killed the intestate from whom he seeks to inherit; and (3) where a spouse has violated obligations toward the intestate.

Many states have passed statutes which control the effect of the misconduct in these areas.[94] The only area covered by statute in Mississippi is that regarding the murder by an heir of the intestate decedent.[95]

B. Abandonment or Denial of Paternity of Child

There are no cases in the law of intestacy in Mississippi where a parent has abandoned or denied the parternity of his child and then

[87] *Id.* at 411-12, 85 So. at 114.
[88] *Id.* at 412, 85 So. at 114.
[89] Illinois Cent. R.R. v. Johnson, 77 Miss. 727, 28 So. 753 (1900).
[90] Alabama & Vicksburg R.R. v. Williams, 78 Miss. 209, 28 So. 853 (1900).
[91] Hemingway's Miss. Code Ann. § 1387 (1917).
[92] Miss. Code Ann. § 474 (1956).
[93] See Atkinson 147; 16 Am. Jur. *Descent and Distribution* § 106 (1958).
[94] 16 Am. Jur. *Descent and Distribution* § 106 (1958).
[95] Miss. Code Ann. § 479 (1956).

claimed part of the estate as an heir when the child died intestate. In fact, there are few cases in the United States where this is the controlling issue.[96] In some jurisdictions which have decided this question, it has been held that the parent is not prevented from inheriting where the intestate laws make no exception because of the abandonment.[97] A few states have passed statutes which bar a parent's right to inherit because of his misconduct.[98] It is submitted that the equitable result would be to completely disinherit parents who desert or disavow their children. This should be accomplished by the passage of a statute; otherwise, if such a situation arises, the court might alter the common law by judicial legislation.

C. Murder of the Ancestor

The majority of cases have held, in the absence of statute, that where an heir or distributee has feloniously killed the intestate, he is still entitled to succeed to the intestate's property.[99] Today, however, most states have statutes which control the disposition or non-disposition of property of the decedent who has been feloniously killed.[100] Mississippi has such a statute which provides as follows:

> If any person *wilfully cause or procure* the death of another in any way, he shall not inherit the property, real or personal, of such other; but the same shall descend as if the person so causing or procuring the death had never been in being. (Emphasis added).[101]

There have been very few cases arising in Mississippi which have interpreted this section of the code. The most noted case is that of *Henry v. Toney*.[102] The court stated that it was not a requisite under our statute that the wilful killing should amount to murder but that it is enough that the killing be wilfull and without justification in law.[103] The facts were that the husband was arraigned in Ohio and indicted by the grand jury for second degree murder of his wife but was convicted only of manslaughter. The Ohio law is similar to the law in Mississippi in regard to manslaughter in that there is no requirement that there be an intent to kill as an essential element. The court felt that the mere conviction of the husband for manslaughter was not conclusive evidence

---

[96] ATKINSON 148.

[97] Files v. Green, 197 IOWA 1169, 196 N.W. 993 (1924); Avery v. Brantley, 191 N.C. 396, 131 S.E. 721 (1926).

[98] ATKINSON 148 n.3.

[99] ATKINSON 153 n.35.

[100] See Annot., 39 A.L.R.2d 477, 494 (1955).

[101] MISS. CODE ANN. § 479 (1956) [There is also a statute covering the felonious killing of one who has a will. MISS. CODE ANN. § 672 (1956)].

[102] 211 Miss. 93, 50 So. 2d 921 (1951).

[103] *Id.* at 97, 50 So. 2d at 922-23.

of an intent to kill but that he should be allowed to testify how the killing occurred before he would be subject to the penalties of our statute.[104] The lower court therefore erred in not allowing such testimony. The effect of the ruling was to permit a new trial in which the husband was allowed to testify concerning the circumstances of the killing and to present evidence relevant to the wilfulness of such killing. A summary of the court's opinion can be observed from the following statement:

> The comparison between the statutes and decisions of Ohio and our State shows that, in both instances, a plea of guilty to manslaughter does not necessarily admit a willful killing. For that reason, it is obvious that such plea cannot be conclusive evidence of guilt of such a killing. On the contrary, it can amount to only slight evidence, or evidence merely that the killing has occurred.[105]

This case is conclusive authority for the proposition that there must have been a wilful causing or procuring the death of another before the heir will be precluded from inheriting his portion of the intestate's property. An earlier case,[106] supporting the same view, held that where there was a substantial conflict in the testimony, the evidence was insufficient to show that the deceased's widow had wilfully procured the intestate's death; therefore she was not prevented from recovering her share of the property. There was no specific reference to the statute in this case.

Though the matter of a beneficiary's rights to the proceeds of an insurance policy is not directly involved in a comment on intestate succession, it should be noted that the Mississippi Supreme Court has inferentially applied both sections 479 and 672 (statute dealing with murder of person who left a will) in order to prevent a beneficiary of an insurance policy from recovering the proceeds of the policy where she wilfully murdered the insured.[107] The principle of the statutes is amenable to the interpretation and application to insurance law because of the policy against allowing one to take advantage of his own wrong. One cannot recover for a loss which he has intentionally caused. This is explained by the court:

> While the quoted statutes do not deal with insurance proceeds as such, they are brought within contemplation by the force of public policy which is solidly established as a controlling principle, and of which our statutes bear recognition.[108]

---

[104]*Id.* at 99-100, 50 So. 2d at 923-24.

[105]*Id.* at 99, 50 So. 2d at 923.

[106]Anderson v. Anderson, 158 Miss. 116, 130 So. 91 (1930).

[107]Gholson v. Smith, 210 Miss. 28, 48 So. 2d 603 (1950).

[108]*Id.* at 30, 48 So. 2d at 604.

D. Misconduct of Spouse

The law dealing with unworthy heirs where a spouse has violated his marital obligations toward the deceased has received some attention by way of cases arising in Mississippi. Generally, the misconduct of a spouse can be classified into three areas: (1) where one spouse commits bigamy by marrying a second time without obtaining a divorce from the first husband or wife; (2) where one spouse commits adultery but does not formally enter into a second marriage; and (3) where one spouse deserts or abandons the other but commits no further ill action. Only the rights to the spouse's distributive share will be discussed in this comment, since Mississippi does not recognize dower or curtesy. It should be noted at the outset that there are no Mississippi statutes covering distribution of the deceased's estate where any of these instances arise.

1. *Bigamy*

It is well settled in Mississippi that where a spouse leaves his lawful husband or wife and enters into a bigamous marriage, that spouse will not be entitled to inherit his distributive share of the lawful spouse's estate.[109] In most of the Mississippi cases the theory of estoppel is applied. Where a husband enters into a bigamous marriage with another woman, he is estopped to inherit from his deceased wife because of his misconduct.[110] Estoppel was applied to a wife whose first husband deserted her, since she later contracted a bigamous marriage even though that subsequent marriage terminated many years prior to the death of her first husband.[111] The same would be true in Mississippi where a spouse entering a bigamous marriage did so upon the legal presumption that her husband had obtained a divorce decree, for she cannot years later attempt to nullify the effects of that presumption in order to claim her rights as his surviving widow.[112]

The basis for applying the theory of estoppel in these cases may be found in *Walker v. Matthews*.[113] The court held that a woman who apparently denied the validity of a lawful common law marriage and entered into a ceremonial marriage to another, recognizing this second marriage as valid, could not later assert her heirship to the estate of her first husband who died intestate. Also, where a husband con-

[109]Baugh v. Brimage, 242 Miss. 459, 135 So. 2d 701 (1961); Minor v. Higdon, 215 Miss. 513, 61 So. 2d 350 (1952); Walker v. Matthews, 191 Miss. 489, 3 So. 2d 820 (1941). See also Williams v. Johnston, 148 Miss. 634, 114 So. 733 (1927), where a widow was not allowed to renounce a will because she had entered into a bigamous marriage. This shows that the same principle holds true where there is a will involved.

[110]Baugh v. Brimage, 242 Miss. 459, 135 So. 2d 701 (1961).

[111]Minor v. Higdon, 215 Miss. 513, 523-24, 61 So. 2d 350, 353 (1952).

[112]*Id.* at 524, 61 So. 2d at 353.

[113]191 Miss. 489, 3 So. 2d 820 (1941).

tracted a bigamous marriage and later procured an invalid divorce decree from his first wife in order to remarry the second wife, he will be estopped from asserting the invalidity of that decree in attempting to inherit from his first wife.[114]

But the doctrine of estoppel will not be applied to a man's legal wife who had knowledge of the pretended marriage of her husband to a second wife where the legal wife neither encouraged nor assented to the illegitimate marriage.[115] The mere knowledge or silence on the part of the first wife is not sufficient to preclude her from claiming her share of the intestate's estate.[116]

Though not directly in point, it should be noted that the theory of estoppel has been applied in suits involving claims to life insurance proceeds where the wife remarries without first obtaining a valid divorce decree.[117] Such misconduct on the part of the spouse prevents him or her from claiming the proceeds as beneficiary of the policy.[118]

2. *Adultery*

The recent case of *Rowell v. Rowell*[119] appears to be authority for the proposition that this state follows the general rule that adultery by one spouse is not sufficient misconduct to preclude that spouse from inheriting her distributive share from her deceased husband. In that case there was evidence that Mrs. Rowell had committed adultery on several occasions, but it also seemed clear that Mr. Rowell, who knew of his wife's conduct, condoned these acts by his own actions. The court readily recognizes that a bigamous marriage is sufficient misconduct to prevent one from inheriting from the deceased[120] but states that it is not so much the conduct but rather the bigamous marriage that gives rise to an estoppel.[121] It has been suggested that the condonation by the husband of the wife's acts may have been the controlling principle influencing the court's decision.[122] If this is true then the question of whether or not adultery precludes a spouse from inheriting her share of the estate is not finally determined in this state, for the court has stated in dictum that where there was a bigamous marriage followed by condonation, such conditional forgiveness is violated by the spouse's

---

[114]Harrison v. G. & K. Inv. Co., 238 Miss. 760, 774, 115 So. 2d 918, 923 (1959).

[115]Williams v. Lee, 130 Miss. 481, 491-92, 94 So. 454, 455 (1923).

[116]*Ibid.*; See also Jackson v. Overton, 96 So. 742 (Miss. 1923).

[117]Woodson v. Colored Grand Lodge, 97 Miss. 210, 52 So. 457 (1910).

[118]Joy v. Miles, 190 Miss. 255, 199 So. 771 (1941).

[119]170 So. 2d 267 (Miss. 1964). See also Annot., 71 A.L.R. 277, 282 (1931).

[120]Rowell v. Rowell, 170 So. 2d 267, 271-72 (Miss. 1964).

[121]*Id.* at 272.

[122]*Note*, 36 Miss. L.J. 415, 417 (1965).

later living in adultery with another person.[123] This might lead one to believe that though the bigamous marriage may have been condoned, subsequent acts of adultery are sufficient to estop a spouse from inheriting his share of the deceased's estate—the adultery rather than the bigamous marriage being the dominating factor.

It is submitted, however, that the controlling factor in arriving at the outcome of the *Rowell* decision was not necessarily the condonation on the part of the husband nor the fact that it was merely adultery that was committed but rather the fact that there was no evidence of a bigamous marriage. In the absence of statute or any precedent cases on the issue of adultery, the court could not impose any exception on this state's descent and distribution statute.[124] Thus, it may be concluded that adultery alone does not preclude inheritance in the absence of a statute to the contrary.

3. *Desertion*

In the absence of statute the general proposition is that the abandonment or desertion of one spouse by the other without further misconduct is a bar of that deserting spouse's rights to his distributive share of an intestate's estate.[125] The Supreme Court of Mississippi has recognized this general rule in the case of *Walker v. Matthews*.[126] However, there is no case in Mississippi which rests on acts of desertion alone; rather, most of them are concerned with the combination of desertion with a bigamous marriage. It is therefore not clear how Mississippi would hold in a situation where the misconduct was attributed only to abandonment or desertion.

The court has held that where the husband was legally married to the intestate and was violently driven from the intestate's home by her brother, the husband was not estopped from asserting title to the home.[127] This was clearly not a case of desertion, and the court itself stated that it was not establishing any rule of estoppel in such cases.[128]

Though there is a split of authority on the issue of whether or not a deserting spouse should be entitled to the homestead and family allowances, it has been suggested by Professor Atkinson in his treatise on wills that the better view would be to preclude the deserting spouse

---

[123]Baugh v. Brimage, 242 Miss. 459, 461-62, 135 So. 2d 701, 702 (1961). *But see* Marshall v. Marshall, 243 Miss. 472, 479, 138 So. 2d 482, 484 (1962), in which a widow was allowed to renounce her husband's will even though she may have committed acts of adultery.

[124]Miss. Code Ann. § 470 (1956).

[125]Annot., 71 A.L.R. 277, 285 (1931).

[126]191 Miss. 489, 511-12, 3 So. 2d 820, 826 (1941).

[127]Parsons v. Butler, 230 Miss. 830, 94 So. 2d 320 (1957).

[128]*Id.* at 833, 94 So. 2d at 320-21.

from such claims on the grounds that these provisions for the preservation of the family unit should not be allowed where the claimant has wilfully destroyed the family relationship.[129]

4. *Conclusion*

There can be no doubt that the Mississippi law is well settled in regard to the rights to the spouse's distributive share of an intestate's property where that spouse claiming such rights has previously contracted a bigamous marriage. It is not so clear where the misconduct is either adultery or desertion.

The Mississippi Workmen's Compensation Act has incorporated the following into its laws:

> The term "widow" or "widower" as contemplated in this act shall not apply to any person who has since his or her separation from decedent entered into a ceremonial marriage or lived in open adultery with another.[130]

This clearly embodies the principle of precluding the surviving spouse from any benefits at the death of the other where such spouse has either contracted a bigamous marriage or committed adultery. A statute to this effect under the laws of descent and distribution would certainly be of assistance in determining the surviving spouse's rights. It is submitted that such a statute should be written so as to prevent the surviving spouse who has committed bigamy, adultery, or been guilty of wilful desertion from inheriting a distributive share of the estate.

VI. Adoption

A. Introduction

The subject of inheritance by reason of adoption has been given more attention through writings and law journal articles than any other aspect of the law of intestacy.[131] There have been several law journal articles written on this area in Mississippi.[132] In 1955 the Mississippi Legislature repealed the former adoption statute[133] and enacted a new one[134] which contained some provisions relating to inheritance by and from an adopted child. The legislature by including a savings clause[135] and in repealing the former statute[136] made all adoption proceedings prior to July 1, 1955, subject to the old statute. In order to come within

---

[129]Atkinson 152 n.30.

[130]Miss. Code Ann. § 6998-02 (Supp. 1964).

[131]See Atkinson 86.

[132]Robertshaw, *Mississippi's New Adoption Law*, 27 Miss. L.J. 32 (1955); McFarlane, *The Mississippi Law on Adoptions*, 10 Miss. L.J. 239 (1938); Note, 3 Miss. L.J. 238 (1931).

[133]Miss. Code Ann. § 1269 (1942).

[134]Miss. Code Ann. § 1269-06 (1956).

[135]Miss. Code Ann. § 1269-10 (1956).

[136]Miss. Code Ann. § 1269-12 (1956).

the provisions of the new statute dealing with intestate succession the adoption must be made after that date. There is a provision in the new statute that allows any child who was adopted prior to 1955 to be re-adopted with considerable ease in order to be subject to the conditions of the new statute.[137] Because of the possibility that litigation may arise at present under the old statute, it is necessary to briefly discuss the effect of the old statute and then note the new statute and the changes resulting therefrom.

B. Old Statute

The pertinent part of the old statute in regard to inheritance reads as follows:

> And the petitioner shall also state in his petition what gifts, grants, bequests or benefits he proposes to make or confer, if any, upon the person sought to be adopted. . . . and . . . such person so adopted shall be entitled to all the benefits proposed by the petitioner to be granted and conferred.[138]

The status of the adopted child would depend upon what was included in the petition for adoption filed by the adopting parent.[139] There are no other provisions for the descent of the property of adopted children in the statutes on descent and distribution. Therefore, the only way that an adopted child could inherit from his adopting parent under the old statute would be through the petition and decree of adoption expressly providing for such.[140] The limitations placed upon such inheritance were strictly construed so that where a petition provided that an adopted child could "inherit from either or both" of the adopting parents, the court would not undertake to extend the right of inheritance to a collateral kindred of the adopting parent.[141]

The court has applied this same reasoning in determining that the adopting parent who provides in the petition that the adopted child shall inherit from him is also entitled to inherit from the adopted child.[142] To hold otherwise would be unjust. So in *Brewer v. Browning*[143] it was held that where an adopted child inherited part of her adopting father's estate the adopting mother was entitled to inherit from the adopted child who died intestate to the exclusion of the child's blood relatives, because the surviving foster parent is the legal mother of the deceased.[144]

---

[137]Miss. Code Ann. § 1269-07 (1956).
[138]Miss. Code Ann. § 1269 (1942).
[139]Note, 3 Miss. L.J. 238 (1931).
[140]*Cf.*, Reeves v. Lowe, 213 Miss. 152, 157, 56 So. 2d 475, 476 (1952).
[141]*Id.* at 164, 56 So. 2d at 479.
[142]See Brewer v. Browning, 115 Miss. 358, 371, 76 So. 267, 272 (1917).
[143]115 Miss. 358, 76 So. 267 (1917).
[144]*Id.* at 371, 76 So. at 272.

The question of whether the adopted child may inherit from his natural parents as well as from his adopting parents has not been conclusively determined in this state. The great weight of authority elsewhere supports the view that the child may inherit from both sets of parents.[145] The *Brewer* decision, however, raises the inference that the adopted child could not inherit from his blood relatives, since they will not inherit from him.[146]

C. New Statute

Section 1269-09 of the Mississippi Code makes express provisions for the inheritance by and from an adopted child:

> The final decree shall adjudicate, in addition to such other provisions as may be found by the court to be proper for the protection of the interests of the child, and its effect, unless otherwise specifically provided, shall be that (a) the child shall inherit from and through the adopting parents and shall likewise inherit from the other children of the adopting parents to the same extent and under the same conditions as provided for the inheritance between brothers and sisters of the full blood by the laws of descent and distribution of the State of Mississippi, and that the adopting parents and their other children shall inherit from the child, just as if such child had been born to the adopting parents in lawful wedlock; (b) the child and the adopting parents and adoptive kindred are vested with all of the rights, powers, duties and obligations, respectively, as if such child had been born to the adopting parents in lawful wedlock, including all rights existing by virtue of section 1453 of the Code of 1942; provided, however, that inheritance by or from the adopted child shall be governed by subsection (a) above . . . . and (d) that the natural parents and natural kindred of the child shall not inherit by or through the child except as to a natural parent who is the spouse of the adopting parent, and all parential rights of the natural parent, or parents, shall be terminated, except as to a natural parent who is the spouse of the adopting parent.[147]

It is clear from the statute that the adopted child may inherit from his adopting parents and any of their children and they from him in accord with the laws of intestate succession. A question may arise, however, as to whether an adopted child can inherit from a sister or brother of the adopting parents. The statute provides that the "child shall inherit from *and through* the adopting parents." (Emphasis added). By the use of the words "and through" it would appear that the child could inherit from a collateral relative, since such person's estate must

---

[145]Note, 3 MISS. L.J. 238, 240 nn. 1 & 2 (1931); See ATKINSON 86-87.

[146]See Note, 3 MISS. L.J. 238, 240 (1931).

[147]MISS CODE ANN. § 1269-06 (1956).

necessarily pass "through" his parent's estate to the child.[148] It could be argued on the other hand that the word "descendants" in section 468 means only blood descendants.[149] Until the court gives its interpretation of the meaning of the words "and through" their exact effect cannot be stated. There is a recent case which may add some light to the issue. In *Gray v. Morgan*[150] the court held that the new statute was not retroactive so that one who was adopted under the old statute would not be entitled to inherit from the collateral heirs of the adoptive mother. The court made the statement that the adopting parents have a right to re-adopt under the new statute.[151] There is an inference from this statement that a different result may have been reached had the child been adopted under the new statute.

Under the statute the adopting parents and their other children are entitled to inherit from the adopted child. In the recent case of *Jones v. Lovell*[152] the court holds that the adoptive parent is entitled to inherit from the adopted child even though the old statute was controlling. The court applies the *Brewer* rule in holding that the property which was given by the mother to the adopted child should come back through the channels from which it came when the child died intestate, and the child's blood relations are not entitled to any part of the property as a result of the adoption proceedings.[153] So it may be concluded that under either statute, the adopting parents should be entitled to inherit from their adopted child where he has inherited or is entitled to inherit from them.

It is expressly stated by the new statute that the natural parents and natural kindred of the adopted child shall not inherit from the child. The statute is silent as to whether the child may inherit from the natural parents. The better rule would seem to be that he could not inherit from his natural parents, since they are expressly prohibited from inheriting from the child. There is no logic in holding otherwise.

Finally, it might be noted that under the statute the adopting parents and adoptive kindred are given all the rights of natural parents and kindred including the right to recover for wrongful death under section 1453. Under section 1453 as amended[154] it is not necessary to re-adopt a child in order to be entitled to recover in a wrongful death action.

---

[148]Robertshaw, *Mississippi's New Adoption Law*, 27 Miss. L.J. 32, 36 (1955).

[149]*Id.* at 37.

[150]236 Miss. 245, 110 So. 2d 346 (1959).

[151]*Id.* at 252, 110 So. 2d at 348-49.

[152]170 So. 2d 431 (Miss. 1965).

[153]*Id.* at 433.

[154]Miss. Code Ann. § 1453 (Supp. 1964).

D. Conclusion

Though the new statute on adoption is subject to the court's interpretation in order to clarify certain aspects, it is believed that it is a vast improvement over the old. In order that it may be utilized to its best advantage it will be necessary that adopting parents re-adopt their children if the children were adopted prior to the passage of the act. Though it may not be a necessity in order to recover for the wrongful death of the child, it could certainly prove beneficial should the adopted child die intestate.

VII. Conclusion

The purpose of this comment has been to make an examination of the major statutes dealing with intestate succession and an interpretation of the case law construing them. It would be impossible within such a limited scope to cover every aspect of the laws of descent and distribution, but it is hoped that the various subjects treated will be of some benefit to the Bar in obtaining an overall picture of the field of intestacy as it presently exists in this state. Of course, there is always room for improvement, and, though our laws on intestate succession are generally good, it is believed that every effort should be made to strive toward perfection in an area that will ever be important.

Landman Teller, Jr.

PUNITIVE DAMAGES IN MISSISSIPPI– A BRIEF SURVEY

I. Introduction

A. Purpose and Scope

It is elemental that the majority of all litigation in today's courts involves an attempt to recover damages. In all but a few states[1] punitive or exemplary damages[2] is one element which the practitioner often must consider. In Mississippi punitive damages have been allowed from an early date,[3] with the theory being applied to a wide variety of circumstances.[4] The purpose of this article is to outline some of the substantive and procedural problems that can arise when punitive damages become an issue and to depict the manner in which they have been handled by our court. The emphasis throughout will be on a brief but broad presentation with extensive citations to the more than three hundred Mississippi cases which have been found involving this issue. With the exception of footnote citations to help the reader locate such information, little attempt will be made to treat the historical and theoretical justifications for punitive damages[5] or to discuss case holdings from an academic standpoint.[6] No attempt will be made to consider the application of special statutory penalties.[7]

---

[1]Apparently four states, Louisiana, Massachusetts, Nebraska, and Washington, reject the doctrine entirely with several others allowing them with specific limitations. See Prosser, Torts § 2 n.60 (3d ed. 1964).

[2]Sometimes called vindictive damages or "smart money." See Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 150, 141 So. 2d 226, 233 (1962).

[3]See, *e.g.*, Bell v. Morrison, 27 Miss. 68 (1854). It might be worthy of note that some authorities have traced the theory back to the Bible. See Mayer v. Frobe, 40 W. Va. 246, 254-56, 22 S.E. 58, 61 (1895) (citing *Exodus* 21:33—: 36, 22:1— :9); 2 Sutherland, Damages § 391 n.8 (4th ed. 1916).

[4]See § II., *infra.*

[5]Several sources are available with an excellent treatment of this subject. See, *e.g.*, McCormick, Damages § 77 (1935); Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517 (1957); Note, *Punitive Damages and Their Application in Automobile Accident Litigation*, 46 Va. L. Rev. 1036 (1960).

[6]An effort will be made to point out the position taken by the majority of American jurisdictions where there appears to be a split since these principles can become quite important to Mississippi cases where conflicts of laws problems are involved. Where the cases appear to have a common thread in theory this, of course, will be pointed out.

[7]See, *e.g.*, Capital Elec. Power Ass'n v. Hinson, 226 Miss. 450, 84 So. 2d 409 (1956) (wrongful cutting of timber); Gabbert v. Treadaway, 194 Miss. 435, 13 So. 2d 157 (1943) (negligent burning); American Express Co. v. Crawley, 88 Miss. 525, 41 So. 261 (1906) (double damages for extortion); Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152 (1903) (telegraphs); Hoole v. Dorroh, 75 Miss. 257 (1897) (statutory double damages for interference with another's servant); Mack, Stadler & Co. v. Jacobs, 70 Miss. 429, 12 So. 444 (1892) (unwarranted attachment).

B. The Basic Law[8]

An excellent statement of the general theory under which punitive damages are assessed in this state is found in the following quote from the very recent case of *Fowler Butane Gas Co. v. Varner*:[9]

> Punitive damages are 'added damages' and are in addition to the actual or compensatory damages due because of an injury or wrong. The kind of wrongs to which punitive damages are applicable are those which, besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries but injuries inflicted in the spirit of wanton disregard for the rights of others. In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring of insult, malice or gross negligence, envincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule....
>
> This Court has pointed out that '. . . in punitive or exemplary damages the award is in the nature of a punishment for wrongdoing and an example, so that others may be deterred from the commission of such wrongs and the public be properly protected.'...
>
> We have said 'Punitive damages are punishing damages; and are awarded to the injured party as a reward for public service in bringing wrongdoers to account.' . . . On the other hand, it must be borne in mind that punitive damages may be recovered not only for wilful and intentional wrong, but for such gross and reckless negligence as is, in the eyes of the law, equivalent to wilful wrong....[10]

If the court's standard of aggravation is met it makes little difference how the wrong is committed, and punitive damages have been recovered in a wide variety of torts. They are not allowed in chancery, however, unless authority for them is expressly conferred or necessarily implied by the provisions of a statute—such as divorce and alimony suits and upon the dissolution of injunctions.[11] With the exception of marriage

---

[8]Many attempts to state the basic theory have been made using various combinations of adjectives. As they are easily located, no attempt is being made to detail them here.

[9]244 Miss. 130, 141 So. 2d 226 (1962) (quoted with the cited authorities omitted). See also Yazoo & M. V. R.R. v. Williams, 87 Miss. 344, 39 So. 489 (1905).

[10]*Id.* at 150-52, 141 So. 2d 233-34.

[11]The history of this issue in Mississippi is quite interesting; but, the issue was apparently put to rest by the recent case of Wilborn v. Balfour, 218 Miss. 791, 804, 67 So. 2d 857, 863 (1953). For a discussion of the earlier Mississippi cases see Annot., 48 A.L.R.2d 947, 958 (1956). See also City of Laurel v. Bush, 238 Miss. 718, 729, 120 So.2d 149 (1960); Clarksdale Hospital v. Wallis, 187 Miss. 834, 193 So. 627 (1940); Howell v. Shannon, 80 Miss. 598, 31 So. 965 (1902); Black v. Robinson, 61 Miss. 54, 59 (1883).

contracts, they are not applicable in suits for breach of contract unless circumstances exist which constitute an independent tort.[12]

II. Mississippi Case Application

Since the nature of the wrong-doer's conduct is controlling rather than the situation in which it manifests itself, with the law of punitive damages cutting across all areas of tort law and at times moving into other fields, the result is a heterogeneous mass of case situations with little common ground save the fact that something more aggravated than a simple wrong is being alleged. No doubt this is the factor which has caused writers in the field with virtual unanimity to shirk a factual classification and to treat the situations in which punitive damages have moving into a detailed discussion of the many more academic points which arise when punitive damages become an issue. Yet facts are the basic building blocks upon which the law suits are constructed, and the attorney confronted with a possible punitive damage recovery finds his most helpful guidelines in a study of the specific situations in which the problem has been before the appellate courts of his forum. It is only with an appreciation of the facts that such a treatment is clumsy, and that many of the classifications will overlap, that a brief survey of Mississippi case application can be undertaken.

A. Willful Wrongs and Oppressive Conduct

Any distinct separation between willful conduct and gross negligence sufficient to warrant punitive damages is one which is difficult and which the courts frequently decline to make.[13] Rather, they appear to avoid drawing a distinction at this point and to meet the defendant's frequent contention that his obviously intentional conduct was not intentional by the simple approach that the court will not quibble over intent—if the conduct was not intentional it was so grossly negligent as to warrant punitive damages. Nevertheless, there is a distinct line of cleavage between the two types of conduct which manifests itself in most of the cases, and it is one which the writer, groping for logical order from the maze, seems forced to seize upon—but not without an awareness that it is frequently opposed to the tenor of the cases.

---

[12]See Dorsey Mississippi Sales, Inc. v. Newell, 168 So. 2d 645, 652 (Miss. 1964); Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (1944); American Ry. Express Co. v. Bailey, 142 Miss. 622, 107 So. 761 (1926). No reference is intended as to liquidated damages which are not punitive damages in any true sense but rather a contractual forfeiture.

[13]See, *e.g.*, Vicksburg & J. R.R. v. Patton, 31 Miss. 156, 198 (1856), where the court stated: "Between wilful mischief and gross negligence the boundary line is hard to trace: I should say impossible . . . ."

1. *Torts Against the Person*

a. Assault and Battery[14]

With relatively rare exceptions[15] both assaults and batteries are matters entered into with the worst of intentions and will justify punitive damages.[16] The fact that criminal charges are also being pressed is no bar to their recovery, and a criminal conviction on a plea of guilty is admissible though not conclusive evidence in the civil suit.[17] Though the acts were committed willfully and intentionally, however, punitive damages will not be allowed where substantial provocation exists[18]—even though the provocation is insufficient to justify the assault and defeat the action.[19] On the other hand, as in cases where it is plead to justify the assault, provocation has been held not to defeat a punitive damage recovery where too far removed from the wrongful conduct[20] or where the retaliation was unreasonable in view of the provocation and amounted to the use of a deadly weapon.[21] Law enforcement officers have been held to be entitled to use substantial force in the apprehension of criminals and to be liable for no more than actual damages where the force used becomes excessive[22] unless clearly guilty of malicious action.[23] The standard of conduct set for private citizens in accosting suspected wrong-doers, however, appears to be much higher.[24]

b. Libel and Slander[25]

If malice can be proved, libel and slander actions are frequently

---

[14]For a collection of a great many cases see Annot., 16 A.L.R. 771 (1922); 123 A.L.R. 1115 (1939). See generally 6 AM. JUR. 2d §§ 186-97, 201 (1963).

[15]See PROSSER, TORTS §§ 9-10 (1964).

[16]See, *e.g.*, Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 So. 766 (1938); Kitteringham v. McClutchie, 41 So. 65 (Miss. 1906); Yazoo & M. V. R.R. v. Williams, 87 Miss. 344, 39 So. 489 (1905); Lochte v. Mitchell, 28 So. 877 (Miss. 1900); Eltringham v. Earhart, 67 Miss. 488, 7 So. 346 (1889); Bell v. Morrison, 27 Miss. 68 (1854); *cf.* Hawkins v. Stringer, 205 Miss. 121, 38 So. 2d 454 (1949); Lopez v. Jackson, 80 Miss. 684, 32 So. 117 (1902); Reese v. Barbee, 61 Miss. 181 (1883). For specific consideration of language see Yazoo & M. V. R.R. v. May, 104 Miss. 422, 61 So. 449 (1913); *cf.* Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935).

[17]Wagner v. Gibbs, 80 Miss. 53, 31 So. 434 (1902).

[18]See Holliman v. Lucas, 202 Miss. 463, 32 So. 2d 259 (1947).

[19]*Id.* at 472, 32 So. 2d at 261.

[20]Thomas v. Mickel, 214 Miss. 176, 58 So. 2d 494 (1952).

[21]Anderson v. Jenkins, 220 Miss. 145, 70 So. 2d 535 (1954).

[22]Holland v. Martin, 214 Miss. 1, 56 So. 2d 398 (1952).

[23]Bearry v. Stringfellow, 246 Miss. 123, 149 So. 2d 500 (1963); Vanderslice v. Shoemake, 233 Miss. 523, 102 So. 804 (1958); Bounds v. Watts, 159 Miss. 307, 131 So. 804 (1931).

[24]See Scott-Burr Stores v. Edgar, 181 Miss. 486, 177 So. 766 (1938).

[25]For a collection of a great many cases on damages for libel and slander see Annot., 35 A.L.R. 2d 218 (1954).

held to support punitive damage verdicts;[26] and due to the difficulty of proving substantial actual damages they are often the incentive for the suit. There is a split among the jurisdictions as to the value of legally implied malice, or malice per se, to support punitive damages,[27] and the issue is not entirely clear in Mississippi.[28] The most affirmative statement available on the issue tends to indicate that malice per se is all that is necessary,[29] at least under the actionable words statute[30] but an inference drawn from a recent case might sustain a contrary argument.[31]

A large number of cases have been concerned with the existence of actual or expressed malice needed to overcome a qualified privilege and support the cause of action.[32] Though some authorities indicate that a different standard should be applied,[33] little distinction appears to have been made in the Mississippi cases[34] and these cases would seem to be valuable precedent to the attorney seeking to determine the requisite malice necessary to justify a punitive recovery.

As in other situations the existence of malice is determined by all the facts of the case,[35] though paramount support may come from a

[26]See, *e.g.*, Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929); Hines v. Shumaker, 97 Miss. 669, 52 So. 705 (1910); Rivers v. Yazoo & Miss. R.R. Co., 90 Miss. 196, 43 So. 471 (1907); Hubbard v. Rutledge, 52 Miss. 581 (1876). *But see, e.g.*, Natchez Times Publishing Co. v. Dunigan, 221 Miss. 320, 72 So. 2d 681 (1954).

[27]See 53 C.J.S. *Libel and Slander* § 260 (1948); McCormick, Damages § 118 (1935), including that by the majority rule actual or express malice is required.

[28]*Compare* Jefferson v. Bates, 152 Miss. 128, 118 So. 717 (1928), *with* Henry v. Collins, 158 So. 2d 28, 38 (Miss. 1963); *cf.* Wells v. Branscome, 222 Miss. 1, 74 So. 2d 743 (1954); Great Atl. & Pac. Tea Co. v. Majure, 176 Miss. 356, 167 So. 637 (1936).

[29]See Jefferson v. Bates, *supra.* note 28, at 132, 118 So. at 719.

[30]Miss. Code Ann. § 1059 (1956).

[31]See Henry v. Collins, 158 So. 2d 28, 38 (Miss. 1963).

[32]See, *e.g.*, Malone v. Montgomery Ward & Co., 38 F. Supp. 369 (S.D. Miss. 1941); Summer Stores of Miss., Inc. v. Little, 187 Miss. 310, 192 So. 857 (1940); Reliance Mfg. Co. v. Graham, 181 Miss. 549, 179 So. 341 (1938); Missouri Pac. Transp. Co. v. Beard, 179 Miss. 764, 176 So. 156 (1937); Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 So. 766 (1938); Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 166 So. 335 (1936); *cf.* McCrory Corp. v. Istre, 173 So. 2d 640 (Miss. 1965); Gardner v. Standard Oil Co., 179 Miss. 176, 175 So. 203 (1937); Louisiana Oil Corp. v. Renno, 173 Miss. 609, 157 So. 705 (1934); Jarnigan v. Fleming, 43 Miss. 710 (1871).

[33]See, *e.g.*, Prosser, Torts § 110, at 821 (3d ed. 1964).

[34]See cases cited *supra.* at note 32.

[35]See, *e.g.*, Summer Stores of Miss. v. Little, *supra.* note 32, the court also stating that all the factors including the enormity of the offense should be considered in fixing the amount of punitive damages, as in the case of criminal libel.

single factor.[36] Two factors have been used, which seem to merit special attention. Subsequent statements of the defendant, even after commencement of the proceedings, have been held admissible to prove malice[37] if meeting the general standards of relevancy.[38] Also, it has been held that since the view of the facts which the jury accepts is from a legal standpoint considered the truth a denial of the slanderous utterance is proof of malice.[39]

c. Torts Against Domestic Interest

Alienation of affection, criminal conversation, and seduction are other torts where punitive damages stand to serve a valuable social interest by providing incentive to bring grievances to court rather than seeking revenge by violence.[40] Consequently, though the causes may have been little litigated in Mississippi, on a national level many cases can be found allowing punitive recovery in such situations.[41] The authority available[42] indicates that Mississippi will follow the majority in allowing punitive damages in cases of seduction[43] and criminal conversation,[44] without specific proof of malice, while requiring an affirmative showing of malice where only alienation of affection is involved.[45] Thus, it would seem that the typical situation involving a marital triangle would present little difficulty to a punitive recovery if proof of illicit relations could be made;[46] and, it has been held that there is nothing to prevent the "wandering spouse" from testifying against the third party.[47]

d. Misuse of Legal Procedure[48]

It has been said that oppressive conduct by public officials was the situation in which early judges were most prone to support a

[36]See, *e.g.*, Louisiana Oil Corp. v. Renno, *supra* note 32, relying heavily upon a statement by the defendant that he was going to see that the plaintiff did not get another job.

[37]Gardner v. Standard Oil Co., 179 Miss. 176, 175 So. 203 (1937).

[38]Scott-Burr Stores Corp. v. Edgar, 181 Miss. 486, 177 So. 766 (1938).

[39]Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 166 So. 335 (1936).

[40]For an excellent treatment of this argument in support of punitive damages generally see Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1198 (1931).

[41]Annot., 31 A.L.R.2d 713 (1953).

[42]Brister v. Dunaway, 149 Miss. 5, 115 So. 36 (1927); *cf.* Stone v. Bang, 153 Miss. 892, 122 So. 95 (1929).

[43]See 79 C.J.S. *Seduction* § 26 (1952).

[44]See Annot., 31 A.L.R.2d 713, 716 (1953).

[45]*Ibid.*

[46]See Brister v. Dunaway, 149 Miss. 5, 115 So. 36 (1927).

[47]*Ibid.*

[48]For a collection of cases reviewing damage awards see generally Annot., 35 A.L.R.2d 273 (1953) (false imprisonment and arrest); Annot., 35 A.L.R.2d 308 (1953) (malicious prosecution).

punitive recovery, and that this sentiment was not long in finding application in cases of wrongful use of legal process by private citizens.[49] To quote from a recent federal decision,[50] "That a case of false arrest or malicious prosecution in Mississippi can be such as to call for the infliction of punitive or exemplary damages is no longer in doubt."[51] Some evidence of malice or oppressive conduct must exist,[52] but the standard has been set at far from a premeditated design to do the plaintiff harm.[53] Absence of any proof of good cause uniformly has been held to fulfill the requirements.[54] One carefully drawn case has set the standard for law enforcement officers seeking to apprehend a party on suspicion of crime: "There must be a good factual reason to definitely suspect as a tenable probability, not a mere possibility."[55] Another case, involving an illegal search and seizure, has held the necessary "willfulness" to be established by the fact that the defendant officer was legally presumed to know the law, thus, the unlawfulness of his action.[56] There are cases indicating that under the proper circumstances punitive damages may be recoverable for malicious threat of prosecution,[57] insanity committment,[58] and replevin.[59]

2. *Oppressive Conduct by Public Service Enterprises*

One writer in the field has said that from the recognition of exemplary damages to protect the public from oppressive conduct by public officials it was but a short step to an application of the theory to public service enterprises[60]—historically held when dealing with the public to a "degree of responsibility unknown to other callings."[61] Mississippi appears to have entered the trend in its mainstream during

[49]McCormick, Damages § 81, at 288 (1935).

[50]Atkinson v. Dixie Greyhound Lines, 143 F.2d 477 (5th Cir. 1944). See also Gardner v. Martin, 123 Miss. 218, 85 So. 182 (1920); Lizana v. State *ex. rel.* Kelly, 109 Miss. 464, 69 So. 292 (1915); Whitfield v. Westbrook, 40 Miss. 311 (1866).

[51]Atkinson v. Dixie Greyhound Lines, *supra* note 50, at 479.

[52]See, *e.g.*, Simonton v. Moore, 204 Miss. 760, 38 So. 2d 94 (1948); Meek v. Harris, 110 Miss. 805, 71 So. 1 (1916); Bacon v. Bacon, 76 Miss. 458, 24 So. 968 (1898); *cf.* Williams v. Planters' Ins. Co., 57 Miss. 759 (1880).

[53]See, *e.g.*, Laster v. Chaney, 180 Miss. 110, 177 So. 524 (1937); United States Fid. & Guar. Co. v. Hardy, 121 Miss. 369, 83 So. 610 (1919).

[54]See, *e.g.*, Atkinson v. Dixie Greyhound Lines, 143 F.2d 477 (5th Cir. 1944); Smith Chevrolet Co. v. Finch, 150 Miss. 854, 117 So. 258 (1928).

[55]Laster v. Chaney, 180 Miss. 110, 117, 177 So. 524, 526 (1937).

[56]United States Fid. & Guar. Co. v. Hardy, 121 Miss. 369, 83 So. 610 (1919).

[57]See Meek v. Harris, 110 Miss. 805, 71 So. 1 (1916).

[58]See Bacon v. Bacon, 76 Miss. 458, 28 So. 968 (1898).

[59]See, *e.g.*, American Nat. Bank & Trust Co. v. Byrd, 191 Miss. 457, 3 So. 2d 850 (1941); Ellzey v. Fredric, 191 Miss. 633, 3 So. 2d 849 (1941); Smith Chevrolet Co. v. Finch, 150 Miss. 854, 117 So. 258 (1928).

[60]McCormick, Damages § 81, at 288 (1935).

[61]Chicago, St. L. & N. O. R.R. v. Scurr, 59 Miss. 456, 465 (1882).

the last century, and litigation of this nature far exceeds all others for presenting exemplary damages to our court as an element in controversy.

a. Public Carriers

Probably stemming from social and economic factors, the great majority of these cases deal with alleged oppressive conduct on the part of the early railroads, though suits may be found involving boats,[62] streetcars,[63] express companies,[64] and buses.[65] Some of the situations are dated, but as long as public carriers are necessities of the society situations will arise where they offer valid precedents.[66] Mississippi cases are available supporting punitive damages against carriers for the following offenses: wrongfully ejecting passengers;[67] carrying passengers past their stations;[68] accosting patrons in insulting fashions;[69] failing to stop when signaled;[70] failing to care for known sick;[71] refusing to carry the blind;[72] allowing insults[73] and fights;[74] willful delaying of pas-

[62]See, *e.g.*, Heirn v. M'Caughan, 32 Miss. 1 (1856).

[63]See, *e.g.*, Jackson Elec. Ry. v. Lowry, 79 Miss. 431, 30 So. 634 (1901).

[64]See, *e.g.*, Richberger v. American Express Co., 73 Miss. 161, 18 So. 922 (1895).

[65]See, *e.g.*, Tri-State Transit Co. v. Worley, 197 Miss. 663, 20 So. 2d 477 (1945).

[66]See, *e.g.* Tri-State Transit Co. v. Worley, *supra.*, with briefs of both counsel relying heavily on earlier railroad decisions.

[67]See, *e.g.*, Illinois Cent. R.R. v. Reid, 93 Miss. 458, 46 So. 146 (1908), where appellant's brief and the court's opinion collect many of the early ejection cases. See also Tri-State Transit Co. v. Worley 197 Miss. 663, 20 So. 2d 477 (1945); Williams v. Southern R.R. Co., 107 Miss. 99, 64 So. 969 (1914). *But see* Yazoo & M. V. R.R. v. Mullen, 158 Miss. 774, 131 So. 101 (1930); Mobile & O. R.R. v. Farrior, 115 Miss. 96, 75 So. 777 (1917); Armstrong v. Pullman Co., 108 Miss. 25, 66 So. 283 (1914); Illinois Cent. R.R. v. Dodds, 97 Miss. 865, 53 So. 409 (1910).

[68]For a collection of many of the early cases on this issue see Yazoo & M. V. R.R. v. Hardie, 100 Miss. 132, 55 So. 42, *sugg. of error overruled,* 100 Miss. 137, 55 So. 967 (1911); See also Illinois Cent. R.R. v. Ramsey, 157 Miss. 83, 127 So. 725 (1930); Mobile & O. R.R. v. Moreland, 104 Miss. 312, 61 So. 424 (1913). *Bee see* Lynchard v. Yazoo & M. V. R.R., 107 Miss. 46, 64 So. 935 (1914); Gulf & S.I. R.R. v. Cole, 101 Miss. 411, 58 So. 208 (1912).

[69]See, *e.g.*, Illinois Cent. R.R. v. Hickman, 146 Miss. 394, 111 So. 588 (1927); Illinois Cent. R.R. v. Cox, 136 Miss. 123, 100 So. 520 (1924); Mobile, J. & K. R.R. v. Kranfield, 92 Miss. 494, 46 So. 71 (1908); Richberger v. American Express Co., 73 Miss. 161, 18 So. 922 (1895). *But see* New Orelans & N. E. R.R. v. Martin, 140 Miss. 410, 105 So. 864 (1925).

[70]See, *e.g.*, Burns v. Alabama & V. R.R., 93 Miss. 816, 47 So. 640 (1908); Southern R.R. v. Lanning, 83 Miss. 161, 35 So. 417 (1903). *But see* St. Louis & S. F. R.R. v. Garner, 96 Miss. 577, 51 So. 273 (1910).

[71]Illinois Cent. R.R. v. Smith, 102 Miss. 276, 59 So. 87 (1912).

[72]Illinois Cent. R.R. v. Smith, 85 Miss. 349, 37 So. 643 (1904).

[73]Gulf, M. & N. R.R. v. Thornberry, 185 Miss. 576, 188 So. 545 (1939).

[74]New Orleans, St. L. & C. R.R. v. Burke, 53 Miss. 200 (1876).

sengers;[75] and obstructing the tracks.[76] Cases involving failure to receive[77] and to deliver[78] goods have been generally unsuccessful, but there seems little doubt that exemplary damages will be sanctioned in such situations where the requisite malice can be established.[79]

b. Telegraphs

During the first two decades of this century the telegraph was another public service enterprise which often found itself answering charges grounded in willful wrong.[80] Frequently, chiefly in situations involving malicious conduct on the part of agents[81] and inexcusable failure to deliver messages,[82] exemplary damages were sanctioned; but many such cases were grounded in mere negligent delivery failures and failed to meet the standard.[83] A great deterent to litigation in this area came in the culmination of a lengthy controversy over the extent to which federal interstate commerce legislation precluded the enforcement of state substantive law.[84] Our court finally concluded that federal legislation was superseding, thus in all cases arising from interstate commerce the federal rule that the master could not be subject to punitive damages for the wrongs of his servant without participation or ratification was applicable.[85]

[75]Illinois Cent. R.R. v. Hawkins, 114 Miss. 110, 74 So. 775 (1917).

[76]Illinois Cent. R.R. v. Engle, 102 Miss. 878, 60 So. 1 (1912).

[77]Alabama & V. R.R. v. Lowry, 100 Miss. 860, 57 So. 289 (1911).

[78]Mobile & O. R.R. v. Flannagan, 141 Miss. 7, 105 So. 749 (1925); Illinois Cent. R.R. v. Smith, 114 Miss. 302, 75 So. 120 (1917); American Express Co. v. Burke & McGuire, 104 Miss. 275, 61 So. 312 (1913).

[79]See Southeastern Express Co. v. Thompson, 139 Miss. 344, 104 So. 80 (1925).

[80]For a large collection of cases see generally Annot., 89 A.L.R. 356 (1934).

[81]See, *e.g.*, Magouirk v. Western Union Tel. Co., 79 Miss. 632, 31 So. 206 (1902).

[82]See, *e.g.*, Western Union Tel. Co. v. Teague, 117 Miss. 401, 77 So. 302 (1918); Johnson v. Western Union Tel. Co., 115 Miss. 884, 76 So. 738 (1917); Postal Tel. Cable Co. v. Ross, 111 Miss. 649, 71 So. 904 (1916); Postal Tel. Cable Co. v. Christian, 102 Miss. 845, 59 So. 933 (1912); Steinberger v. Western Union Tel. Co., 97 Miss. 260, 52 So. 691 (1910); Western Union Tel. Co. v. Hiller, 93 Miss. 658, 47 So. 377 (1908); Hartzog v. Western Union Tel. Co., 34 So. 361 (Miss. 1903); Western Union Tel. Co. v. Watson, 82 Miss. 101, 33 So. 76 (1903).

[83]See, *e.g.*, Western Union Tel. Co. v. Ragsdale, 111 Miss. 550, 71 So. 818 (1916); Western Union Tel. Co. v. Koonce, 112 Miss. 173, 72 So. 893 (1916); Western Union Tel. Co. v. Miller, 97 Miss. 225, 52 So. 701 (1910); Western Union Tel. Co. v. Jackson, 95 Miss. 471, 49 So. 737 (1909); Western Union Tel. Co. v. Spratley, 84 Miss. 86, 36 So. 188 (1904); Western Union Tel. Co. v. Pearce, 82 Miss. 487, 34 So. 152 (1903); Western Union Tel. Co. v. Rogers, 68 Miss. 748, 9 So. 823 (1891).

[84]For a history of this issue see Western Union Tel. Co. v. Wallace, 164 Miss. 759, 146 So. 142 (1933); Dickerson v. Western Union Tel. Co., 114 Miss. 115, 74 So. 779 (1917); Western Union Tel. Co. v. Showers, 112 Miss. 411, 73 So. 276 (1916).

[85]See Western Union Tel. Co. v. Rogers, 172 Miss. 852, 161 So. 131 (1935).

c. Public Utilities

The suppliers of telephone service,[86] electricity,[87] and water[88] at times have fallen the victim of judicial attempts to use damages as an example to protect the public against oppressing conduct. Insulting patrons has been held to warrant punitive damages,[89] and our court has made it very clear that any attempt to coerce action by discontinuing service will be quick to meet with a similar result.[90] Mississippi's decision to follow the majority in refusing to assess exemplary damages against municipalities has resulted in the exemption of many such enterprises—especially suppliers of water and sewage service.[91]

d. Hotels, Theaters, and Other Enterprises

Though the theoretical justification available in support of exemplary damages for oppressive conduct would seem most tenable in situations involving enterprises enjoying virtual monopolies, application has not been limited to these groups. On the contrary, there are cases upholding substantial punitive recoveries against both hotels[92] and theaters,[93] indicating that there is no apparent obstacle to such recovery against a wide variety of other business enterprises under proper circumstances.[94] From a practical standpoint it would appear, however, that the public's power to effect its own vindication against competitive enterprises would set a different standard under many situations which might arise.

---

[86]See, *e.g.*, Critz v. Southern Bell Tel. & Tel., 178 Miss. 323, 172 So. 510, *sugg. of error overruled*, 178 Miss. 334, 173 So. 430 (1937). *But see* Cumberland Tel. & Tel. v. Paine, 94 Miss. 883, 48 So. 229 (1909); Cumberland Tel. & Tel. v. Allen, 89 Miss. 832, 42 So. 666 (1906). See generally Annot., 23 A.L.R. 952 (1923).

[87]See, *e.g.*, Capital Elec. Power Ass'n v. Hinson, 230 Miss. 311, 92 So. 2d 867 (1957). *But see* Simonton v. Moore, 204 Miss. 760, 38 So. 2d 94 (1948); Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937); Mississippi Power & Light Co. v. Harper, 145 So. 887 (Miss. 1933); Mississippi Power Co. v. Byrd, 160 Miss. 71, 133 So. 193 (1931). See also Capital Elec. Power Ass'n v. McGuffee, 226 Miss. 227, 83 So. 2d 837 (1955), pointing up the necessity of bringing the suit in Circuit Court if punitive damages are sought.

[88]See, *e.g.*, Woods v. Town of Indianola, 114 Miss. 722, 75 So. 549 (1917); Vicksburg Waterworks v. Dutton, 98 Miss. 209, 53 So. 537 (1910). *But see* Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922).

[89]See Town of Newton v. Wilson, *supra.* note 88.

[90]Capital Elec. Power Co. v. Hinson, 230 Miss. 311, 92 So. 2d 867 (1957).

[91]See Town of Newton v. Wilson, *supra.* note 88.

[92]See, *e.g.*, Milner Hotels, Inc. v. Brent, 207 Miss. 892, 43 So. 2d 654 (1949); Arky. v. Leitch, 131 Miss. 14, 94 So. 855 (1923). See *cf.* Milner Hotels, Inc. v. Dougherty, 195 Miss. 718, 15 So. 2d 358 (1943), for a case grounded on an actionable words theory.

[93]See, *e.g.*, Saenger Theatres Corp. v. Herndon, 180 Miss. 791, 178 So. 86 (1937).

[94]See, *e.g.*, Annot., 126 A.L.R. 206, 227 (1940) (banks); Annot., 31 A.L.R. 1362 (1924) (druggist).

3. *Torts Against Pecuniary Interest*

Although for obvious reasons of much less frequent occurrence than cases of aggravated conduct against the person, there have been numerous cases establishing the applicability of exemplary assessment in a wide variety of situations involving injury to pecuniary interest. In the majority of the cases where the issue has arisen in Mississippi a tangible interest has been the foundation of the action. Several cases may be found, however, involving damage to intangibles,[95] and a survey of other jurisdictions yields many examples of punitive recovery where only intangible interests were involved.[96]

a. Trespass

The most numerous class of cases falling within this category are those involving some form of aggravated trespass.[97] As in other instances there must be an element of malice or recklessness.[98] The fact that the owner's permission has been asked and refused raises a very high presumption of malice.[99] Though one is ordinarily exonerated from punishment if acting under a belief in his own ownership or claim of right[100] and is always entitled to show such acts of good faith as a bona fide attempt to locate one from whom permission could be secured,[101] even these factors will not shield him from punitive damages where his acts are against the plaintiff's protest and not under circumstances of emergency.[102] The fact that the trespass is done by one who

[95]See, *e.g.*, Sovereign Camp W. O. W. v. Boykin, 182 Miss. 605, 181 So. 741 (1938), allowing punitive damages for "grossly unjustifiable" fraud. *But see* Anderson v. King, 217 Miss. 140, 63 So. 2d 792 (1953); McCain v. Cochran, 153 Miss. 237, 120 So. 823 (1929); Grenada Bank v. Lester, 126 Miss. 442, 89 So. 2 (1921).

[96]See, *e.g.*, Annot., 72 A.L.R.2d 943, 947 (1960) (fraud as to credit); Annot., 26 A.L.R.2d 1227, 1274 (1952) (procuring breach of contract); Annot., 9 A.L.R.2d 228, 271 (1950) (interference with business relation).

[97]See, *e.g.*, Fair Lumber Co. v. Weems, 196 Miss. 201, 16 So. 2d 770 (1943); *cf.* Williams v. Newberry, 32 Miss. 256 (1856). See also Annot., 67 A.L.R.2d 444, 460 (1959), for a collection of cases on punitive damages for unauthorized geophysical survey.

[98]See, *e.g.*, Lynn v. Le Tourneau, Inc., 237 Miss. 124, 113 So. 2d 659 (1959); Western Union Tel. Co. v. Johnston, 114 So. 746 (Miss. 1927); Mississippi Cent. R.R. v. McClendon, 106 Miss. 671, 64 So. 460 (1914); Keystone Lumber & Improvement Co. v. McGrath, 21 So. 301 (Miss. 1897); New Orleans, B. R., V. & M. R.R. v. Brown, 64 Miss. 479, 1 So. 637 (1886); *cf.* Aldridge v. Park, 195 Miss. 713, 16 So. 2d 41 (1943).

[99]See Cumberland Tel. & Tel. v. Cassedy, 78 Miss. 666, 29 So. 762 (1900).

[100]See Anderson-Tully Co. v. Campbell, 193 Miss. 790, 10 So. 2d 445 (1942); Neal v. Newburger Co., 154 Miss. 691, 123 So. 861 (1929). See also 87 C.J.S. *Trespass* § 112 (1954).

[101]See Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962); Geophysical Survey v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958).

[102]See Avera v. Williams, 81 Miss. 714, 33 So. 501 (1902); *cf.* Hunter v. Williams, 230 Miss. 72, 92 So. 2d 367 (1957).

possesses eminent domain powers is no defense where the power is not exercised,[103] nor is the right to punitive damages affected by the fact that the suit also claims a statutory penalty unless the statute is drafted to be exclusive.[104]

As in other areas of the law the idea of the inviolability of the home holds a high place in the judicial mind, and our court has made it clear that a trespassory entering of "man's castle" will be quick to merit the imposition of punitive damages.[105] It has been under this theory that a strong line of cleavage has been drawn in cases dealing with repossession under conditional sales contracts.[106] Generally the trespass incident to repossession of ordinary chattels, typically automobiles, is under a claim of right and though wrongful and willful will not warrant exemplary damages[107] unless accompanied by very aggravated circumstances.[108] When the chattel to be repossessed is in the home, however, a much higher standard has been drawn, and it would appear that the wise attorney would in most instances advise his client to resort to legal procedures in the absence of the owner's expressed and unqualified consent to his entry.[109]

b. Nuisance

Nuisance is another tort, very closely related to trespass, which has occasionally served as the basis for the infliction of punitive damages.[110] Though it is certainly possible for a nuisance to be created maliciously and with a predetermined design to harm the property owner,[111] the very great majority of nuisances are unintentional.[112] For this reason, in the ordinary case where punitive damages are sought the justification

---

[103]Cumberland Tel. & Tel. v. Cassedy 78 Miss. 666, 29 So. 762 (1900).

[104]Day v. Hamilton, 237 Miss. 472, 115 So. 2d 300 (1959). *But see cf.* Silver Creek Navigation & Improvement Co. v. Mangum, 64 Miss. 682, 2 So. 11 (1887).

[105]See, *e.g.*, Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935); Bonelli v. Bowen, 70 Miss. 142, 11 So. 791 (1892).

[106]See generally Annot., 153 A.L.R. 769 (1944).

[107]See, *e.g.*, West Bros., Inc. v. Barefield, 239 Miss. 530, 124 So. 2d 474 (1960); Bradley v. Associates Discount Corp., 230 Miss. 131, 92 So. 2d 468 (1957); Potomac Ins. Co. v. Wilkinson, 220 Miss. 740, 71 So. 2d 765 (1954).

[108]See Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938); *cf.* Hughes v. Gurley, 55 So. 2d 469 (Miss. 1951).

[109]See Kirkwood v. Hickman, 223 Miss. 372, 78 So. 2d 351 (1955).

[110]See 66 C.J.S. *Nuisances* § 178 (1950). See also Annot., 49 A.L.R.2d 253, 311 (1956) (pollution of stream); Annot., 19 A.L.R.2d 769, 782 (1951) (pollution of well).

[111]See, *e.g.*, Annot., 133 A.L.R. 691 (1941) (spite fences).

[112]See, *e.g.*, Laurel Equip. Co. v. Matthews, 218 Miss. 718, 67 So. 2d 258 (1953); Masonite Corp. v. Windham, 210 Miss. 90, 48 So. 2d 622 (1950); Biloxi City R.R. v. Maloney, 74 Miss. 738, 21 So. 561 (1897); *cf.* Interstate Oil Pipe Line Co. v. Valentine, 236 Miss. 400, 110 So. 2d 369 (1959).

for the award must come from proof that the wrong-doer was aware of the harm that he was causing and refused to effect an abatement.[113]

c. Torts Against Personalty

Like the interest in real property, chattel interest is given a high degree of protection in our law, and any intentional or malicious invasion of personal property interest may warrant the infliction of exemplary damages.[114] Though the great departure from the forms of action in the last century has obliterated most of the distinctions between the numerous causes of action which arose from an interference with chattel interest, many vestiges remain.[115] Apparently, however, if the requisite malice and willfulness is established it makes little difference what type action is being prosecuted, and punitive recoveries have been supported in actions for replevin,[116] conversion,[117] and wrongful detention.[118]

B. Gross Negligence and Wanton Disregard

As has been demonstrated, the primary basis for the imposition of punitive damages is the existence of a willful or intentional wrong. Yet, our courts have long recognized a class of conduct which though not engaged in with the conscious intention to do a certain wrong or to harm a particular individual, nevertheless, is undertaken in a spirit of such recklessness or wantonness as to manifest an absence of concern as to possible consequences.[119] Here the law will imply malice—a

[113]See Jett Drilling Co. v. Jones, 169 So. 2d 463 (Miss. 1964); Southland Co. v. McDonald, 225 Miss. 19, 82 So. 2d 448 (1955); Southland Co. v. Aaron, 221 Miss. 59, 72 So. 2d 161 (1954); Yazoo & M. V. R.R. v. Sanders, 87 Miss. 607, 40 So. 163 (1905).

[114]See 18 Am. Jur. 2d *Conversion* § 93 (1965); 77 C.J.S. *Replevin* § 285 (1952). See also Annot., 54 A.L.R.2d 1361 (1957); *cf.* Annot., 85 A.L.R.2d 1349, 1363 (1962).

[115]See Prosser, Torts §§ 14-15 (3d ed. 1964).

[116]See, *e.g.*, Austin Machinery Corp. v. Clark-Hunt Constr. Co., 140 Miss. 78, 103 So. 1 (1925). *But see* Standard Finance Corp. v. Breland, 249 Miss. 413, 163 So. 2d 232 (1964); Mars v. Hendon, 178 Miss. 157, 171 So. 880 (1936); Acree v. Bufford, 80 Miss. 565, 31 So. 898 (1902); Illinois Cent. R.R. v. Brookhaven Mach. Co., 71 Miss. 663, 16 So. 252 (1893); Cowden v. Lockridge, 60 Miss. 385 (1882).

[117]See Robinson & Pattison v. Goings, 63 Miss. 500 (1886); Storm v. Green, 51 Miss. 103 (1875). *But see* Potomac Ins. Co. v. Wilkinson, 220 Miss. 740, 71 So. 2d 765 (1954); Sumrall Motor Co. v. Creel, 158 Miss. 262, 130 So. 151 (1930); Black, Todd & Co. v. Robinson, 62 Miss. 68 (1884); Jamison v. Moon, 43 Miss. 598 (1871).

[118]See Briscoe v. McElween, 43 Miss. 556 (1871); Whitfield v. Whitfield, 40 Miss. 352 (1866); *cf.* Yazoo & M. V. R.R. v. May, 104 Miss. 422, 61 So. 449 (1913).

[119]For a collection of many cases seeking to delineate the standard of recklessness or gross negligence under which the courts of the various jurisdictions allow punitive damages see Annot., 98 A.L.R. 267 (1935).

malice in law.[120] The type conduct which will merit such implied malice has been variously classified and denominated,[121] but by far the most frequently used term is gross negligence.[122] The use of this term has been vigorously criticized,[123] and it has been blamed for much of the confusion which surrounds the area.[124] Regardless of where the fault lies or the real extent of the confusion, one cannot dig very deeply into this area of the law, cannot endeavor to extract the basic rules and to define the salient standards, without a quick appreciation of the fact that any standard which the courts have attempted to define is a very subjective one. As with any subjective standard courts vary, and the decisions of a given court will seem to vacillate. Our court has repeatedly emphasized that in making this determination all the facts of the case must be taken into consideration.[125] Although there are cases which appear impossible of reconciliation with others,[126] when one considers that the facts printed in a given opinion are at best expertly drawn condensations, it would seem that the logical mind groping for order, if imaginative, could make any necessary reconciliation on this basis.

1. *Early Negligence Cases*

Although the controversy during the past several decades has centered largely around the negligent operation of the automobile, our Supreme Court has been at grips with the issue for more than a century,[127] and the basic law had been made many generations before the Model T.[128] With the exception of a few cases which can be found involving alleged gross negligence in other areas, such as the operation of a horse drawn wagon,[129] the vast majority of the early cases involved some element of negligence in the operation or handling

[120]See Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 151, 141 So. 2d 226, 234 (1962).

[121]See 25 C.J.S. *Damages* § 123 (f) (1941).

[122]See, *e.g.*, Planters Wholesale Grocery Co. v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951).

[123]See, *e.g.*, PROSSER, TORTS § 2, at 10 (3d ed. 1964).

[124]See MCCORMICK, DAMAGES § 79 (1935).

[125]See, *e.g.*, Pelican Trucking Co. v. Rossetti, 167 So. 2d 924, 926 (Miss. 1964); Bush v. Watkins, 224 Miss. 238, 242, 80 So. 2d 19, 21 (1955).

[126]*Compare* Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955), *with* Belk v. Rosamond, 213 Miss. 633, 57 So. 2d 461 (1952), where the court seemingly makes a considerable distinction between one's concern for his own life and his concern for the life of his child.

[127]See, *e.g.*, Vicksburg & J. R.R. v. Patton, 31 Miss. 156 (1856).

[128]For an excellent early case with a complete discussion of the theory of punitive damages for gross negligence see Memphis & C. R.R. v. Whitfield, 44 Miss. 466 (1870).

[129]See Southern Express Co. v. Brown, 67 Miss. 260, 7 So. 318 (1889).

of locomotives.[130] Early cases can be found assessing exemplary damages against railroads under a gross negligence theory with the following basic factual situations: hitting pedestrians[131] or animals[132] on the tracks when they could have been easily seen; allowing trains to collide;[133] running faster than the train could be stopped in the distance that the lights would shine;[134] reckless handling of occupied passenger coaches;[135] failing to give statutory required signals before crossing roads;[136] hitting flooded tracks when they should have been anticipated;[137] and exceeding municipal speed laws.[138] At times the court appeared to lose sight of the basic standard, and one case has been found wherein the court went so far as to imply that any negligence by a railroad was gross negligence[139]—to the concern of several justices writing subsequent decisions.[140] For the most part, however, the Court maintained the basic standard of something slightly less than willful conduct, but considerably more than simple negligence, and one case can be found in which the court emphatically states that two acts of simple negligence cannot be combined to supply the necessary gross negligence.[141] This is very much in line with the theory which has been at the forefront in the modern era.[142]

2. *Modern Gross Negligence—Age of the Automobile*[143]

Much as it has come to dominate the field of torts generally, during recent decades the motor vehicle has come to supplant the

[130]It must be kept in mind that many of the cases which have been considered previously in the sections on oppressive conduct by public carriers contained strong arguments of "if not willful then grossly negligent." See, *e.g.*, Godfrey v. Meridian Light & Ry., 101 Miss. 565, 58 So. 534 (1911).

[131]See, *e.g.*, Young v. Columbus & G. Ry. Co., 165 Miss. 287, 147 So. 342 (1933); Alabama & V. Ry. v. Kelly, 126 Miss. 276, 88 So. 707 (1921); *cf.* Illinois Cent. R.R. v. Owens, 95 So. 833 (Miss. 1923); Illinois Cent. R.R. v. Fuller, 106 Miss. 65, 63 So. 265 (1913); Gulf & S. I. R.R. v. Boone, 120 Miss. 632, 82 So. 335 (1919); Hollingshed v. Yazoo & M. V. R.R., 99 Miss. 464, 55 So. 40 (1911).

[132]Vicksburg & J. R.R. v. Patton, 31 Miss. 156 (1856). *But see* Yazoo & M. V. R.R. v. Brumfield, 4 So. 341 (Miss. 1888); Chicago, St. L. & N. O. R.R. v. Jarrett, 59 Miss. 470 (1882).

[133]Yazoo & M. V. R.R. v. Fletcher, 100 Miss. 589, 56 So. 667 (1911).

[134]St. Louis & S. F. R.R. v. Moore, 101 Miss. 768, 58 So. 471 (1911).

[135]Yazoo & M. V. R.R. v. Roberts, 88 Miss. 80, 40 So. 481 (1906); *cf.* Illinois Cent. R.R. v. Brown, 77 Miss. 338, 28 So. 949 (1899).

[136]Illinois Cent. R.R. v. Armstrong, 93 Miss. 583, 47 So. 527 (1908).

[137]Illinois Cent. R.R. v. Cole, 113 Miss. 896, 74 So. 766 (1917).

[138]Stevens v. Yazoo & M. V. R.R., 81 Miss. 195, 32 So. 311 (1902). *But see* Hudson v. Louisville & N. R.R., 30 F.2d 391 (5th Cir. 1929).

[139]See New Orleans, J. & G. N. R.R. v. Bailey, 40 Miss. 395 (1866).

[140]See Chicago, S. L. & N. O. R.R. v. Scurr, 59 Miss. 456 (1882).

[141]Jackson Light & Traction Co. v. Taylor, 112 Miss. 60, 72 So. 856 (1916).

[142]See, *e.g.*, Morris v. Huff, 238 Miss. 111, 117 So. 800 (1960).

[143]For a large collection of cases on punitive damages in automobile accidents see Annot., 62 A.L.R.2d 813 (1958).

venerable railroad as the major agency through which the issue of punitive damages for less than actual willful misconduct arises for consideration by our Court. In proportion to the total these cases are not numerous,[144] but they loom significant to one seeking to determine the type conduct which will be deemed "willful negligence."[145]

As has been earlier emphasized, much of the confusion which surrounds this area of the law stems directly from the use of the term gross negligence.[146] Thus, the path to any understanding of the standard which our cases appear to delineate seems keyed to an appreciation of the fact that the term gross negligence, as it is used in this area, is not synonymous with gross carelessness.[147] Rather, our Court appears to have sided with the majority in holding that carelessness, no matter how gross will not subject the wrongdoer to punitive damages.[148] The court has made it patently clear that the wrong-doer can be guilty of new unbelievable miscalculations, of errors in judgment that would shock the ordinary mind, and yet not be subject to punitive damages if from all the facts of the case it can be said that he manifested a state of mind commensurate with the attitude of one who cares about the welfare and property of those about him.[149] Tersely stated, the Court seems to ask itself not, "What was the degree of the defendant's negligence?" but rather, "Did the defendant act as one in good faith with society?" Such a standard, in common with many known to the law, is a very subjective one which will vary slightly with changes in the personalities who must put it into effect. It is a standard, however, which seems compatible with the basic theory under which punitive damages are awarded in this state.[150]

As with any legal standard, be it "good faith with society"[151] or "reckless indifference to consequences without substantial effort at avoidance,"[152] the only guidelines for its application are found in the

---

[144]The writer has located slightly less than thirty Mississippi cases involving punitive damages in traffic accidents, as compared to approximately three hundred dealing with the field at large. Well over a third of the total cases have a railroad as one party.

[145]This is a term which has been used at various times throughout the history of our cases. See, *e.g.*, Southeastern Express Co. v. Thompson, 139 Miss. 344, 104 So. 80 (1925).

[146]See note 124 *supra* and accompanying text.

[147]See McCormick, Damages § 79, at 281 (1935).

[148]See, *e.g.*, Prosser, Torts § 2, at 10 (3d ed. 1964).

[149]See Belk v. Rosamond, 213 Miss. 633, 57 So. 2d 461 (1952).

[150]See note 9 *supra* and accompanying text.

[151]The writer's own effort to define the standard as it appears to have been set.

[152]This is substantially the language of the most definitive statement on gross negligence which has been found in any Mississippi case. See Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 723, 50 So. 2d 578, 584 (1951); Teche Lines, Inc. v. Pope, 175 Miss. 393, 400, 166 So. 539, 540 (1936).

records of the decided cases. All the facts in combination are controlling, though certain salient factors appear particularly subject to recurrence, giving them added weight as precedent. Thus, one may drive at such a high rate of speed as to manifest a complete absence of concern for the other members of society,[153] though certainly not every violation of the speed laws will meet this standard.[154] One may drive while so intoxicated as to evidence this frame of mind,[155] though not every driver who imbibes will be so considered.[156] Likewise one may be so inattentive as to fail to see a traffic signal[157] or another vehicle,[158] or he may back,[159] or pass,[160] or drive so close,[161] or leave his car,[162] or do any number of other acts[163] in such a fashion as, when considered along with all other factors, will cause the court to feel that a jury would be justified in awarding punitive damages. It is the defendant's state of mind, not what he does that is controlling; thus, though the character of his actions assumes tremendous importance it does so only as very convincing evidence as to his state of mind. For this reason, evidence of his conduct before and after the occurrence is

---

[153]See, *e.g.*, Hadad v. Lockeby, 176 Miss. 660, 169 So. 691 (1936); McDonald v. Moore, 159 Miss. 326, 131 So. 824 (1931); Galtney v. Wood, 149 Miss. 56, 115 So. 117 (1928); *cf.* Wilson v. State, 173 Miss. 372, 161 So. 744 (1935).

[154]See, *e.g.*, Maupin v. Dennis, 175 So. 2d 130 (Miss. 1965); *cf.* Greyhound Corp. v. Townsend, 234 Miss. 839, 108 So. 2d 208 (1959) (mere fact that act is unlawful is not of itself grounds for exemplary damages).

[155]See, *e.g.*, Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So. 2d 572 (1950); Richton Tie & Timber Co. v. Smith, 210 Miss. 148, 48 So. 2d 618 (1950).

[156]See Comment, *Liability of an Intoxicated Driver for Punitvie Damages*, 25 FORDHAM L. REV. 493, 497 (1956); 48 IOWA L. REV. 645 (1961); Annot., 3 A.L.R.2d 212 (1949).

[157]See, *e.g.*, Dame v. Estes, 233 Miss. 315, 101 So. 2d 644 (1958); Reid v. Halpin, 178 So. 88 (Miss. 1938). *But see* Jones v. Carter, 192 Miss. 603, 7 So. 2d 519 (1942).

[158]See Teche Lines, Inc. v. Pope, 175 Miss. 393, 166 So. 539 (1936). This case has been cited by Prosser in his general treatise as a case which somewhat departs the general American standard. See PROSSER, TORTS § 2, at 10 n. 71 (3d ed. 1964).

[159]See, *e.g.*, Ellis v. Pellegrini, Inc., 163 Miss. 385, 141 So. 273 (1932). *But see* Duvigneaud v. Jenkins, 241 Miss. 179, 129 So. 2d 629 (1961); Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962).

[160]See, *e.g.*, Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955). *But see* Greyhound Corp. v. Townsend, 234 Miss. 839, 108 So. 2d 208 (1959).

[161]See Pennebaker v. Parker, 232 Miss. 725, 100 So. 2d 363 (1958); *cf.* Morris v. Huff, 238 Miss. 111, 117 So. 2d 800 (1960).

[162]See, *e.g.*, Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951); *cf.* Belk v. Rosamond, 213 Miss. 633, 57 So. 2d 461 (1952).

[163]For several other Mississippi cases considering punitive damages in negligence actions see Boroughs v. Oliver, 226 Miss. 609, 85 So. 2d 191 (1956); Gordon v. Carr, 226 Miss. 836, 85 So. 2d 490 (1956); Robinson v. Colotta, 199 Miss. 800, 26 So. 2d 66 (1946).

relevant,[164] though it has been held that the entire case for punitive damages cannot be made by subsequent actions.[165] Under the same theory contributory negligence will have no mitigating effect if the defendant's conduct warrants an exemplary award.[166] Similarly, one's good faith with society is clearly affected by any peculiar knowledge that he may have relative to the danger,[167] or by the fact that what he is doing or handling obviously has greater than ordinary potential for harm.[168]

Though in recent years the automobile cases have dominated the field, they have not done so to the complete exclusion of other negligence causes. On the contrary, several cases have arisen in the industrial and commercial areas in which punitive damages have formed a major element of the appellate controversy. Thus, the court has upheld such awards in cases involving gasoline explosions,[169] electrocutions,[170] and car-train collisions.[171] The fact that most of the modern cases have involved some element of personal injury is in no way indicative of the fact that this is a requirement, and at least one case has seemed compelled to point out rather emphatically that wanton, reckless disregard for the property rights of others is equally worthy of civil punishment.[172]

III. Party Liability and Related Problems

Mississippi apparently follows the general rule[173] that punitive damages must be recovered by the person wronged or for his use and are not subject to assignment.[174] Thus, it has been held that parents of an injured child are not entitled to punitive damages in their own right

[164]See, *e.g.*, Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962).

[165]Pelican Trucking Co. v. Rossetti, 167 So. 2d 924 (Miss. 1964).

[166]See Reid v. Halpin, 178 So. 88 (Miss. 1938).

[167]See Sandifer Oil Co. v. Dew, 220 Miss. 609, 631, 71 So. 2d 752, 758 (1954).

[168]*Ibid.*

[169]Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954), 14 NACCA L.J. 309 (1954).

[170]Ennis v. Yazoo & M. V. R.R., 118 Miss. 509, 79 So. 73 (1918); *cf.* Carrier Lumber & Mfg. Co. v. Boxley, 103 Miss. 489, 60 So. 645 (1912); Bradford v. Taylor, 85 Miss. 409, 37 So. 802 (1904).

[171]Gulf, M. & O. R.R. v. Hawthone, 225 Miss. 1, 82 So. 2d 454 (1955).

[172]See Greyhound Corp. v. Townsend, 234 Miss. 839, 846, 108 So. 2d 208, 210 (1959), where the court stated: "Of course, punitive damages may be awarded in a proper case in an action for wrongful injury to property." See also Building Insulators, Inc. v. Stuart, 243 Miss. 287, 136 So. 2d 613 (1962); Ellis v. Pellegrini, Inc., 163 Miss. 385, 141 So. 273 (1932); *cf.* Robinson v. Colotta 199 Miss. 800, 26 So. 2d 66 (1946).

[173]See 25 C.J.S. *Damages* § 124 (1941).

[174]See Leavenworth & Sons, Inc. v. Hunter, 150 Miss. 245, 116 So. 593 (1928).

unless the case is one for seduction.[175] Although the right to punitive damages is extinguished with the death of the wrong-doer[176] the death of the person wronged has no such effect; and, while a different rule prevails in many jurisdictions,[177] under both our general abatement and revival[178] and wrongful death[179] statutes the right to exemplary recovery has been held to survive.[180] In the absence of statute punitive damages are not recoverable against the government,[181] or sureties,[182] or municipal corporations acting solely in the public interest,[183] but they are allowed against public utilities[184] and against receivers.[185]

Although the federal rule and the rule in many jurisdictions requires some element of ratification or participation,[186] Mississippi follows the broad doctrine that punitive damages are recoverable from the principal or master for the wrongful acts of the servant if committed within the scope of his employment.[187] Likewise, though some states take a contrary position,[188] in Mississippi a partnership is liable for both actual and exemplary damages where the wrong is committed by one of the partners acting within the scope of the partnership business.[189]

---

[175]See Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 141 So. 2d 226 (1962).

[176]Miss. Code Ann. § 610 (1956). See Hewlett v. Ragsdale, 68 Miss. 703, 9 So. 885 (1891).

[177]See Annot., 63 A.L.R.2d 1327 (1959) (general abatement and revival statutes); Annot. 94 A.L.R. 384 (1935) (wrongful death).

[178]Miss. Code Ann. § 609 (1956).

[179]Miss. Code Ann. § 1453 (1956).

[180]See Wagner v. Gibbs, 80 Miss. 53, 31 So. 434 (1902) (general statute); Bush v. Watkins, 224 Miss. 238, 80 So. 2d 19 (1955); Sandifer Oil Co. v. Dew, 220 Miss. 609, 71 So. 2d 752 (1954) (wrongful death).

[181]See Payne v. Bartlett, 127 Miss. 189, 89 So. 912 (1921). For an analysis of recovery under the Federal Tort Claims Act see Annot., 1 A.L.R.2d 222, 241 (1948).

[182]See Vanderslice v. Shoemake, 233 Miss. 523, 102 So. 2d 804 (1958); Lizana v. State *ex rel.* Kelly, 109 Miss. 464, 69 So. 292 (1915).

[183]Town of Newton v. Wilson, 128 Miss. 726, 91 So. 419 (1922). *But see* Woods v. Town of Indianola, 114 Miss. 722, 75 So. 549 (1917). See generally Annot., 19 A.L.R.2d 903 (1951).

[184]See Capital Elec. Power Ass'n v. Hinson, 230 Miss. 311, 323, 92 So. 867, 871 (1957).

[185]Gardner v. Martin, 123 Miss. 218, 85 So. 182, 10 A.L.R. 1054 (1920).

[186]25 C.J.S. *Damages* § 125, at 733 (1941). For an excellent coverage of the theory behind and the strategy under these two positions see Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 220 (1960). See also Note, 70 Yale L.J. 1296 (1961).

[187]See, *e.g.*, Sandifer Oil Co. v. Dew, 220 Miss. 609, 630, 71 So. 2d 752, 758 (1954); Rivers v. Yazoo & M. R.R., 90 Miss. 196, 43 So. 471 (1907).

[188]See 68 C.J.S. *Partnership* § 168, at 618 (1950).

[189]See Robinson & Pattison v. Goings, 63 Miss. 500 (1886); Heirn v. McCaughan, 32 Miss. 17 (1856); *cf.* Idom v. Weeks & Russell, 135 Miss. 65, 99 So. 761 (1942).

By the same token, though most states hold otherwise,[190] Mississippi follows the rule that in a case with joint defendants punitive damages are recoverable against them all if justified by the conduct of the most culpable.[191]

Although there have been some noted holdings to the contrary,[192] the most celebrated being a recent Fifth Circuit decision from Florida,[193] by the majority rule insurance coverage of punitive damages is not against public policy,[194] and the general insuring clause of most liability insurance policies will be held to cover them.[195] There is nothing to keep the insurer from expressly excluding such coverage from the contract,[196] however, and most policies have clauses which absolve the insurer from liability in a case of willful wrong.[197] Due to this factor, one noted authority has emphasized that the alert plaintiff when interested in preserving insurance coverage will be careful to allege wantonness or recklessness as opposed to willfulness.[198]

IV. Relation to Actual Damages

It has been said that one of the most confusing areas in the law of punitive damages is found in the relationship which they must bear to actual damages.[199] Certainly such a statement holds true for Mississippi. Among the various jurisdictions a great variety of positions have been taken with regard to the necessity of actual damages to support a punitive verdict, and it appears that for nearly every position a Mississippi case can be found which lends some support. Some of the rules which have been applied by various courts are the following:[200]

[190]See 15 Am. Jur. *Damages* § 294 (1938). For a good coverage of many of the problems which can arise in multi-party situations together with some well grounded theory on proper solutions see Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1192 (1931).

[191]See Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950); Bell v. Morrison, 27 Miss. 68 (1854). *But see* Western Union Tel. Co. v. McKinney, 109 Miss. 1, 67 So. 647 (1915). For an extensive coverage of the complicated problems which can arise relative to apportionment and contribution of a punitive award between joint tortfeasors see Note, *Apportionment of Punitive Damages*, 38 Va. L. Rev. 71 (1952).

[192]*E.g.*, Universal Indemnity Ins. Co. v. Tenery, 96 Colo. 10, 39 P.2d 776 (1934).

[193]Northwestern Nat'l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962).

[194]See Note, *Coverage of Punitive Damages by a Liability Insurance Policy*, 39 N.D.L. Rev. 332, 333 (1963).

[195]See Brin, *Punitive Damages and Liability Insurance*, 31 Ins. Counsel J. 265 (1964).

[196]See Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 222 (1960).

[197]See 7 Appleman, Insurance Law & Practice § 4312 (1942).

[198]Belli, Modern Trials § 407, at 2519 (1954).

[199]Note, 70 Harv. L. Rev. 517, 528 (1957).

[200]See Annot., 17 A.L.R.2d 529 (1951).

actual damages must be awarded;[201] there must be a showing, though not an award of actual damages;[202] nominal damages are sufficient;[203] and no actual damages are needed.[204] Taking the Mississippi cases as a group, it seems that our court has consistently held that at most nominal damages must be proved in cases of defamation arising from words that are actionable per se.[205] As to causes other than defamation one case,[206] which has been cited as placing Mississippi in the group of jurisdictions requiring a recovery of actual damages,[207] uses the following language: "It is well settled that in all cases where punitive damages are predicated on actual damages, if no actual damages are allowed, punitive damages are not recoverable. . . . "[208] Several subsequent cases have given additional weight to this position as the present status of the Mississippi law.[209] In an earlier case,[210] however, which has never been expressly overruled, the Court took the position presently adopted by a growing minority of jurisdictions. Here, the Court said: "In many jurisdictions the courts of last resort have decided that, in the absence of actual damages, exemplary damages are not recoverable. But this court is committed to a contrary view. . . ."[211] This is the position that has been taken by many of the recent writers,[212] who assert that cases where only nominal damages are recoverable are frequently those which most deserve punitive damages and that the instance where the jury finds the conduct to warrant punitive damages yet fails to award nominal damages is generally the result of their inability to grasp the legal distinctions between the types of damages.[213]

Once it is determined that actual damages are a necessary pre-

[201]See, *e.g.*, McCain v. Cochran, 153 Miss. 237, 275, 120 So. 823, 828 (1929).

[202]See, *e.g.*, Continental Cas. Co. v. Garrett, 173 Miss. 676, 683, 161 So. 753, 755 (1935).

[203]See Young v. Columbus & G. Ry., 165 Miss. 287, 295, 147 So. 342, 344 (1933); Yazoo & M. V. R.R. v. Barringer, 138 Miss. 296, 305 103 So. 86, 87 (1925); Arky v. Leitch, 131 Miss. 14, 19, 94 So. 855 (1923); *cf.* Kansas City, M. & B. R.R. v. Fite, 67 Miss. 373, 7 So. 223 (1889).

[204]See Johnson v. Western Union Tel. Co., 115 Miss. 884, 890, 76 So. 738 (1917).

[205]See, *e.g.*, Kroger Grocery & Baking Co. v. Harpole, 175 Miss. 227, 241, 166 So. 335, 340 (1936).

[206]McCain v. Cochran, 153 Miss. 237, 120 So. 823 (1929).

[207]Annot., 17 A.L.R.2d 527, 536 (1951).

[208]McCain v. Cochran, 153 Miss. 237, 275, 120 So. 823, 828 (1929).

[209]See Lenaz v. Conway, 234 Miss. 231, 105 So. 2d 762 (1958); Anderson v. King, 217 Miss. 140, 63 So. 2d 792 (1953).

[210]Johnson v. Western Union Tel. Co., 115 Miss. 884, 76 So. 738 (1917).

[211]*Id.* at 890, 76 So. 738.

[212]See, *e.g.*, OLECK, DAMAGES § 275D (1961); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 529 (1957). For a good discussion of the theory behind the rule that actual damages are a necessary predicate see 2 SUTHERLAND, DAMAGES § 406 (1916).

[213]*Ibid.*

requisite to a punitive award, in many states another troublesome problem often arises—the requirement that punitive damages be proportionate to actual damages.[214] There is a great split of authority among the jurisdictions on this issue,[215] but it appears that a growing number of courts are ceasing to apply the requirement.[216] Probably stemming from our generally followed practice of lump-sum verdicts, this issue has been little contested in Mississippi.[217] There is the indication, however, that a punitive award of at least twice the actual damages will be readily sanctioned.[218]

V. Pleading, Practice, and Strategy

After having analyzed his case from the standpoint of basic liability for punitive damages, the astute plaintiff's attorney must then proceed to appraise himself of the advisability of an attempt to obtain such a recovery—for while in the proper case such an attempt may prove quite advantageous, if misguided it may be a definite detriment. The extent to which he will be able to avail himself of the possible advantages while avoiding possible disadvantages will depend in large measure on how well he has been able to analyze the justifiability of exemplary assessment under the particular facts of his case. Also, while it is not necessary that the declaration demand punitive damages if the facts warrant them[219] and a proper instruction is requested,[220] a timely demand in the declaration assures the plaintiff of several advantages which might be denied him at a later time.[221]

---

[214]See Comment, *Need Punitive Damages Be Proportionate to Compensatory Damages?*, 23 Rocky Mt. L. Rev. 206 (1950).

[215]See Annot., 17 A.L.R.2d 527, 548-50 (1951).

[216]*Compare* Annot., 17 A.L.R.2d 527, 548-50 (1951), *with* 17 A.L.R.2d 527, 548-50 (Bound Supp. 1965 at 982-84).

[217]See, *e.g.*, Capital Elec. Power Ass'n v. Hinson, 230 Miss. 311, 318, 92 So. 2d 867, 869 (1957).

[218]See Sandifer Oil Co. v. Dew, 220 Miss. 609, 627, 71 So. 2d 752, 757 (1954); *cf.* West Bros. v. Barefield *ex rel.* Cornett Motor Express, Inc., 239 Miss. 530, 124 So. 2d 474 (1960); Hunter v. Williams, 230 Miss. 72, 92 So. 2d 367 (1957).

[219]For cases where punitive damages were allowed though none were plead see Laurel Equip. Co. v. Matthews, 218 Miss. 718, 67 So. 2d 258 (1953); Southern Express Co. v. Brown, 67 Miss. 260, 7 So. 318 (1889). Where a willful wrong is plead but no such evidence is offered it is treated as mere surplusage. See Hollingshed v. Yazoo & M. V. RR., 99 Miss. 464, 55 So. 40 (1911).

[220]See Hawkins v. Stringer, 205 Miss. 121, 38 So. 2d 454 (1949); Gulf, M. & N. R.R. v. Graham, 153 Miss. 72, 117 So. 881 (1928); Illinois Cent. R.R. v. Hickman, 146 Miss. 394, 111 So. 588 (1926). *But see* Western Union Tel. Co. v. Teague, 117 Miss. 401, 77 So. 302 (1918). For a case involving a demand for punitive damages in a proper case but an improper count in the declaration see Illinois Cent. R.R. v. Harper, 83 Miss. 560, 35 So. 764 (1903).

[221]See, *e.g.*, Yazoo & M. V. R.R. v. Roberts, 88 Miss. 80, 40 So. 481 (1906), where the court indicated that if punitive damages were being demanded they were the proper subject of questioning on voir dire.

Possible advantages in putting punitive damages into issue arise from several somewhat disconnected elements of the case, but they will be lumped together for purposes of outline. Thus, if the right to punitive damages is in issue, the defendant cannot admit his liability and foreclose the plaintiff from showing all the facts of the occurrence, many of which might have a substantial effect on the jury's determination of the amount of the more intangible elements of compensatory damages.[222] Where the case involves willful and malicious wrong the defendant may not satisfy the judgment by a discharge in bankruptcy.[223] Where the state law being applied adheres to such a rule,[224] contributory negligence is no defense if punitive damages are being alleged.[225] Since punishment is the basic theory behind punitive damages, the financial ability of the defendant to pay bears a vital relationship to the severity of the punishment.[226] Under this theory, our Court like the majority has uniformly held that once a prime facie case has been made justifying punitive damages[227] the wealth of the defendant may be proved.[228] This has been successfully done in a variety of manners,[229] and since wealth has become a relevant issue in the case the plaintiff may avail himself of the discovery procedures to obtain such information.[230] Though many courts hold to the contrary,[231] the presence of

---

[222]See 2 AVERBACH, HANDLING ACCIDENT CASES 133 (1958).

[223]See Annot., 13 A.L.R.2d 168 (1950).

[224]See 65 C.J.S. *Negligence* § 130 (1950).

[225]65 C.J.S. *Negligence* § 131 (1950).

[226]See, *e.g.*, Bell v. Morrison, 27 Miss. 68, 86 (1854).

[227]See, *e.g.*, Parkins v. Brown, 241 F.2d 367, 368 n.2 (5th Cir. 1957); Yazoo & M. V. R.R. v. Williams, 87 Miss. 344, 357, 39 So. 489, 492 (1905).

[228]See, *e.g.*, Whitfield v. Westbrook, 40 Miss. 311, 320 (1866). See generally 25 C.J.S. *Damages* § 126, at 741 (1941). For the effect of improperly admitted evidence of wealth *compare* Pennebaker v. Parker, 232 Miss. 725, 100 So. 2d 363 (1958), *with* Jones v. Carter, 192 Miss. 603, 7 So. 2d 519 (1942). See also Eltringham v. Earhart, 67 Miss. 488, 7 So. 346 (1889), allowing the plaintiff to prove his poverty.

[229]See, *e.g.*, Hunter v. Williams, 230 Miss. 72, 92 So. 2d 367 (1957); Thomas v. Mickel, 214 Miss. 176, 58 So. 2d 494 (1952) (real estate appraisal); Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53 (1897) (corporate assets). There has been some argument that considering the theory of punitive damages liability insurance coverage should be admissible, but there is apparently almost no case authority on this issue. See BELLI, TRIAL AND TORT TRENDS 90 (1958) (where he asserts that this question had been asked at eight seminars without any information being divulged); *cf.* Annot., 4 A.L.R.2d 761 (1949). For a case where facts were utilized which were already in the record and which tended to show wealth see Yazoo & M. V. R.R. v. Smith, 188 Miss. 856, 196 So. 230 (1940).

[230]See Interstate Co. v. Garnett, 154 Miss. 325, 341, 122 So. 373, 376 (1929); Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 808, 22 So. 53, 59 (1897). For an excellent recent case directly in point see Coy v. Superior Court of Contra Costa Co., 58 Cal. App. 2d 210, 373 P.2d 457 (1962).

[231]See 32 MISS. L.J. 319, 320 (1961); Annot., 63 A.L.R. 1405 (1929).

joint defendants does not defeat this right in Mississippi,[232] under the theory that to rule otherwise would allow the most culpable to escape proper punishment by joining himself with less wealthy wrong-doers.[233] While some courts follow a different rule,[234] under our practice attorney's fees and the expenses of litigation become a legitimate element of damages[235] on which proof may be offered[236] when punitive damages are justified. Although our Court will certainly do so if it appears in the interest of justice,[237] in the usual instance of a lump-sum verdict[238] the Court is reluctant to interfere with the award where punitive damages have been properly submitted to the jury;[239] and a punitive award is frequently valuable support for a large verdict.[240]

Considering only this rather formidable list of potential advantages, it might appear that the wise plaintiff should allege willful, reckless misconduct as a matter of rote. The attorney who presents plaintiff's causes with any regularity, however, is quick to learn that the defendant need have little fear of such an indiscriminate approach; for a misguided effort to obtain a punitive recovery can substantially damage the plaintiff's case on several fronts. In the first instance, where punitive damages have been put into issue the scope of the defendant's admissible evidence in mitigation is substantially broadened.[241] Thus, while such evidence is generally not admissible if only compensatory damages are

[232]Interstate Co. v. Garnett, 154 Miss. 325, 122 So. 373 (1929); Bell v. Morrison, 27 Miss. 68 (1854).

[233]*Ibid.*

[234]See 15 AM. JUR. *Damages* § 145 (1938).

[235]See, *e.g.*, Cooper v. United States Fid. & Guar. Co., 186 Miss. 116, 188 So. 6 (1939); Smith Chevrolet Co. v. Finch, 150 Miss. 854, 117 So. 258 (1928). Proof of an aggravated case may also be valuable in securing damages for mental suffering and humiliation apart from physical injury. See, *e.g.*, Continental Cas. Co. v. Garrett, 173 Miss. 676, 161 So. 753 (1935).

[236]See Yazoo & M. V. R.R. v. Consumers' Ice & Power Co., 109 Miss. 43, 67 So. 657 (1915).

[237]See, *e.g.*, Gulf, M. & O. R.R. v. Hawthone, 225 Miss. 1, 82 So. 2d 454 (1955); Alabama & V. Ry. v. Kelly, 126 Miss. 276, 88 So. 707 (1921). If remittitur is made to actual damages it must be to their lowest valuation. See Chicago, St. L. & N. O. R.R. v. Jarrett, 59 Miss. 470 (1882). Where the plaintiff accepts a remittitur in the lower court he cannot raise punitive damage issue on appeal. See Commercial Credit Co. v. Spence, 185 Miss. 293, 184 So. 439 (1938).

[238]See, *e.g.*, Building Insulators, Inc. v. Stuart, 243 Miss. 287, 136 So. 2d 613 (1962). There is apparently nothing, however, to prevent plaintiff's attorney from submitting an instruction requesting a separate verdict, and to do so might be quite beneficial where a substantial compensatory verdict was expected and the justice of a punitive award doubtful. For an example of a case apparently representing such an award see Duvigneaud v. Jenkins, 241 Miss. 179, 129 So. 2d 629 (1961). See generally 88 C.J.S. *Trial* § 322 (1955).

[239]See, *e.g.*, Teche Lines, Inc. v. Pope, 175 Miss. 393, 166 So. 539 (1936).

[240]See, *e.g.*, Planters Wholesale Grocery v. Kincade, 210 Miss. 712, 50 So. 2d 578 (1951).

[241]See BELLI, TRIAL & TORT TRENDS 260 (1959).

being sought,[242] the defendant may prove any facts which would tend to show good faith[243] or absence of malice.[244] Some courts have held that he may prove his good character,[245] and others have allowed specific proof of fines and criminal punishment to be weighed by the jury.[246] Since the defendant's wealth has become a material issue, he is entitled to prove his poverty,[247] and by the rule in some jurisdictions he may do this regardless of the fact that the plaintiff declines to offer proof of wealth.[248] A second factor which works to the plaintiff's detriment is that if in the view of the trial court no case has been made which would justify the jury in awarding punitive damages[249] the defendant is entitled to an instruction that no punitive damages are to be awarded.[250] Since the distinction between the types of damages is frequently a hard one for the jury to grasp, such an instruction has great potential for diminishing even the compensatory elements of any verdict which the plaintiff may recover. A third possible detriment arises on appeal. Even though the lower court may have allowed the plaintiff

---

[242]See 25 C.J.S. *Damages* § 71, at 562 (1941).

[243]See, *e.g.*, Wood v. Mississippi Power Co., 245 Miss. 103, 146 So. 2d 546 (1962); Geophysical Survey v. Thigpen, 233 Miss. 454, 102 So. 2d 423 (1958).

[244]See, *e.g.*, Yazoo & M. V. R.R. v. Mullen, 158 Miss. 774, 131 So. 101 (1930), where the court emphasized that ordinarily a willful wrong requires some knowledge of its wrongfulness.

[245]See 25 C.J.S. *Damages* § 159 (1941).

[246]*Ibid.*

[247]See, *e.g.*, Eltringham v. Earhart, 67 Miss. 488, 7 So. 346 (1889), where the court emphasized that the wealth and respective social positions of both parties is material and may be proved—even to the extent of the *plaintiff* proving *his* poverty.

[248]Very few courts have been called upon to decide this issue. By what appears to be the majority view the defendant is entitled to prove his poverty regardless of the fact that no evidence has been offered as to his wealth. See Rea v. Harrington, 38 Vt. 181, 2 Atl. 475 (1886); Johnson v. Smith, 64 Me. 553 (1875). Support for this position as the proper one has been voiced by at least one writer. See Morris, *Punitive Damages in Personal Injury Cases,* 21 Ohio St. L.J. 227 n.35 (1960). *Contra,* Mullin v. Spangenberg, 112 Ill. 140 (1884).

[249]The court has repeatedly emphasized that a punitive instruction is improper where there is no substantial evidence to show an aggravated wrong. See, *e.g.*, Lynn v. Le Tourneau, Inc., 237 Miss. 124, 113 So. 2d 659 (1959); Bradley v. Associates Discount Corp., 230 Miss. 131, 92 So. 2d 468 (1957). Once the plaintiff has introduced such evidence, however, a punitive instruction is proper regardless of the fact that this evidence is directly contradicted by the defendant's version of the facts. See, *e.g.* Hadad v. Lockeby, 176 Miss. 660, 169 So. 691 (1936); Louisville & N. R.R. v. Maybin, 66 Miss. 83, 5 So. 401 (1888); Wilson v. New Orleans & G. N. R.R., 63 Miss. 352 (1885).

[250]See, *e.g.*, Simonton v. Moore, 204 Miss. 760, 38 So. 2d 94 (1948); Chicago, St. L. & N. O. R.R. v. Scurr, 59 Miss. 456 (1882). At least under certain circumstances this is true regardless of the fact that the plaintiff does not request a punitive damage instruction. See Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 153, 141 So. 2d 226, 233 (1962).

a punitive instruction[251] it frequently happens that the Supreme Court on review of the record may determine that there was insufficient evidence to support the trial court in its ruling.[252] Although the Supreme Court will not reverse on this ground if it can say with certainty that the erroneous punitive instruction was not harmful,[253] typically where actual damages support the award,[254] in the usual instance of an unseparated verdict such a determination can not be made.[255] In view of the fact that some authorities are of the opinion that the jury finds ample room to bring to bear any spirit of vindication that the defendant's conduct may have aroused in computing the more intangible elements of actual damages,[256] having a sizeable verdict reversed for a new trial on damages due to an improper punitive damages instruction may seem to many plaintiffs' attorneys a gamble without a gain. As a final consideration the plaintiff must realize that he has no *right* to punitive damages, and if the jury fails to award them, no matter how erroneous their decision may be as a matter of principle, the issue is not appealable.[257]

Conclusion

In his much used work on Mississippi jury instructions,[258] Judge Julian P. Alexander limited his treatment of punitive damages with the following statement:

> Whether a particular case is one authorizing an allowance of exemplary damages, and instructions thereon, is a matter of substantive law and is beyond our discussion.[259]

Leaving the very important subject of jury instructions to Judge Alexander's very able and easily accessible treatment, but entertaining the hope that at least a brief skeleton has been drawn of the vast area which he was forced to except, the writer rests his case.

Alfred G. Nichols, Jr.

---

[251]It might be pertinent to mention that the court has indicated on several occasions that the trial court's determination will resolve the doubt in a close case. See, *e.g.*, Ellis v. Pellegrini, Inc., 163 Miss. 385, 141 So. 273 (1932); McDonald v. Moore, 159 Miss. 326, 131 So. 824 (1931).

[252]See, *e.g.*, Morris v. Huff, 238 Miss. 111, 117 So. 800 (1960).

[253]See, *e.g.*, Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 155, 141 So. 2d 226, 235 (1962).

[254]See, *e.g.*, Richton Tie & Timber Co. v. Smith, 210 Miss. 148, 159, 48 So. 2d. 618, 622 (1950).

[255]See, *e.g.*, Biloxi City R.R. v. Maloney, 74 Miss. 738, 21 So. 561 (1897). *But see* Masonite Corp. v. Windham, 210 Miss. 90, 98, 48 So. 2d 622, 625 (1950).

[256]See Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 226 (1960), where he states: "The theory of punitive damages (without the name) is built into the average juror's value system; the latitude permitted in calculating personal injury awards is so wide that proof of defendant's outrage will enhance some verdicts without express instruction allowing punitive damages."

[257]See, *e.g.*, Illinois Cent. R.R. v. Cole, 113 Miss. 896, 901, 74 So. 766, 768 (1917), where the court makes this point, but goes on to say that the trial court may under proper circumstances instruct the jury that if they believe the plaintiff's evidence there is gross and wanton negligence as a matter of law.

[258]1 Alexander, Mississippi Jury Instructions § 1759 (1953).

[259]*Id.* at 428.

RECENT DECISIONS

Conflict of Laws—Applicable Law For Multi-State Tort Actions

Plaintiff brought suit in Wisconsin against her husband and his insurer for injuries resulting from the husband's alleged negligent operation of an automobile in which plaintiff was riding. All the parties to the suit were domiciled in Wisconsin. The accident occurred in Nebraska, under whose statutes an injured guest may recover from his host only if the host was intoxicated or guilty of gross negligence. Plaintiff alleged only ordinary negligence, this being an adequate basis for recovery in Wisconsin. Defendant demurred to the complaint on the grounds that the law of the place where the tort occurred should be applied and that no cause of action was shown under Nebraska law. This demurrer was sustained by the trial court and plaintiff appealed. Held: Reversed and remanded. When a tort action involves more than one state, the applicable law may be that of the forum, the tort state, or another state, as their interests appear; furthermore, not all of the issues presented by the case must be resolved by reference to the law of the same jurisdiction. *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

For many years American courts have held that the rights and liabilities of the parties to a tort action are to be determined with reference to the substantive law of the place where the tort occurred.[1] The origin of this rule, *lex loci delicti*, has been traced[2] to *Dennick v. Railroad Co.*[3] By 1934, the rule had achieved general acceptance[4] and was adopted by the American Law Institute.[5] Recently, however, the law of the place rule has been subjected to strong criticism by legal commentators[6] and avoided or rejected by a growing number of courts.[7] In addition, the old rule has now been discarded in the latest recommendations of the American Law Institute.[8] The criticisms of the strict law of the place of tort rule may be roughly categorized as follows: (1) the situs of an unintentional tort is purely fortuitous;[9] (2) the rights

---

[1]Comment, 62 Mich. L. Rev. 1358 (1964).

[2]Comment, 51 Calif. L. Rev. 762, 763-64 (1963).

[3]103 U.S. 11 (1880).

[4]See Comment, 51 Calif. L. Rev. 762, 764 (1963).

[5]Restatement, Conflict of Laws § 377 (1934).

[6]For a comprehensive list see the articles noted in Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 801 (1964).

[7]Watts v. Pioneer Corn Co., 342 F.2d 617 (7th Cir. 1965); Grant v. McAuliffe, 41 Cal. 2d 859, 264 P.2d 944 (1953); Fabricius v. Horgen, 132 N.W.2d 410 (Iowa 1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

[8]Restatement (Second), Conflict of Laws § 379 (Tent. Draft No. 9, 1964).

[9]*E.g.*, Kilberg v. Northeast Airlines, Inc., 9 N.Y.2d 34, 39, 172 N.E.2d 526, 527, 211 N.Y.S.2d 133, 135 (1961).

and liabilities of parties, arising out of their relationship to each other, should not alter as they travel from place to place;[10] and (3) the law of the place rule is a purely mechanical device which, by ignoring policy considerations, often brings about anomalous results.[11]

Whatever the reason chosen, the rejection of *lex loci delicti* as a mechanical rule must be accompanied by the formulation of a new approach to choice of law problems in the tort area. Unfortunately, none of the various rationales proposed as a substitute for the old rule has found unqualified acceptance.[12] Under the approach most recently suggested by the American Law Institute, the applicable law for multi-state torts is that of the single state which can be said to have the "most significant relationship" with the tort and the parties involved.[13] The now famous opinion in *Babcock v. Jackson*[14] referred to a similar choice of law doctrine as a "grouping of contacts,"[15] but added that not all of the issues had to be controlled by the law of the same jurisdiction.[16] In *Griffith v. United Air Lines, Inc.*[17] the court abandoned the law of the place rule in favor of a "qualitative" analysis of the policy underlying each state's relationship to the dispute. The Supreme Court of Iowa has recently employed the "most significant relationship" test but, in doing so, the court expressly indicated which issues should be governed by the law of the tort state and which by the law of the forum.[18] Despite this apparent trend away from *lex loci delicti*, most jurisdictions,[19] including Mississippi, still purport to follow the old rule.[20] There seem to be two primary reasons for this continued use. First, the old rule has the advantage of easy application; no policy-oriented inquiry is necessary.[21] Second, numerous exceptions have been engrafted upon the law of the place rule over the years.[22] Among these exceptions are the rules that the law of the place of wrong controls only substantive matters and that no jurisdiction need apply a foreign law which contravenes its public policy.[23] It has even been suggested that many multi-state torts present no policy conflict and thus, in those

---

[10]*E.g.*, Babcock v. Jackson, 12 N.Y.2d 473, 483, 191 N.E.2d 279, 285, 240 N.Y.S.2d 743, 751 (1963).

[11]See Comment, 62 MICH. L. REV. 1358, 1360 (1964).

[12]See Weintraub, *A Method for Solving Conflict Problems—Torts*, 48 CORNELL L.Q. 215, 216 (1963); Cross, *Federal Tort Claims Acts and Conflict of Laws*, 36 MISS. L.J. 1, 17 (1964).

[13]RESTATEMENT (SECOND), CONFLICT OF LAWS § 379 (Tent. Draft No. 9, 1964).

[14]12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

[15]*Id.* at 481, 191 N.E.2d at 283, 240 N.Y.S.2d at 749.

[16]*Id.* at 484, 191 N.E.2d at 285, 240 N.Y.S.2d at 752.

[17]416 Pa. 1, 203 A.2d 796, 806 (1964).

[18]Fabricius v. Horgen, 132 N.W.2d 410 (Iowa 1965).

[19]Comment, 51 CALIF. L. REV. 762, 764 (1963).

[20]*E.g.*, Welch v. Kroger Grocery Co., 180 Miss. 89, 177 So. 41 (1937).

[21]See Comment, 62 MICH. L. REV. 1358, 1359-60 (1964).

[22]See Comment, 51 CALIF. L. REV. 762, 770 (1963).

[23]See, *e.g.*, Northern Pac. R.R. v. Babcock, 154 U.S. 190, 197 (1894); McArthur v. Maryland Cas. Co., 184 Miss. 663, 688-89, 186 So. 305, 309-10 (1939).

instances, a general rule requiring application of the forum's law would not be inappropriate.[24]

By distinguishing individual cases, the courts have often managed to arrive at just results despite the law of the place rule; however, such exceptions do not provide an affirmative basis by which to evaluate future controversies. The *Wilcox* decision contributes to the creation of such a basis. It recognized the "contacts"[25] which are generally regarded as relevant, but provided that they would control the choice of law only when they had a substantial effect on one of the jurisdictions involved. Emphasis was placed on an issue by issue analysis of the interest, if any, which each of the competing jurisdictions had in the application of its own law. Those issues in which other jurisdictions had no overriding interest were resolved according to the law of the forum. Since all the parties in the *Wilcox* case were domiciled in the forum state, the court had little difficulty in deciding that the forum had the "most significant relationship" with the controversy. Of perhaps greater importance was the court's statement that *"lex loci delicti, lex fori,* or a combination of the two or the law of a third state . . ."[26] could be applied if necessary to produce a just result. This statement, while making clear the court's departure from the strict law of the place rule, also provided that the old method would not be replaced by an equally rigid rule which would always lead to the application of *lex fori.* Thus *Wilcox* lifts almost all of the old choice of tort law restrictions from the Wisconsin courts. They are now free to weigh the interests of all the jurisdictions involved in a multi-state tort action and to apply to each individual issue the law of that jurisdiction whose interests appear to be greatest. It is submitted that this approach merits the consideration of the Mississippi courts.

Michael B. Taylor

Constitutional Law—Freedom of Speech In Postal Delivery of Communist Political Propaganda From Foreign Countries

A statute[1] required the post office to detain unsealed mail that contained communist political propaganda from foreign countries. A reply card was then sent to the addressee of the mail. If the reply card was not sent back to the post office within twenty days, requesting delivery of the mail, the mail was destroyed. The only alternative to this procedure was to have the mail recipient placed on a list of those people who wanted to receive all their mail unimpeded. Two separate actions were brought to enjoin the enforcement of the statute. Both plaintiffs claimed their rights under the first and fifth amendments were infringed and that the statute which authorized this action by the post office was unconstitutional. In the first case[2] a United States District Court

[24]Comment, 51 Calif. L. Rev. 762, 767 (1963).

[25]See Restatement (Second) Conflict of Laws § 379 (Tent. Draft No. 9, 1964).

[26]Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408, 410 (1965).

[1]Postal Service and Federal Employees Salary Act § 305, 76 Stat. 840 (1962), 39 U.S.C. § 4008 (1958).

[2]Lamont v. Postmaster General, 229 F. Supp. 913 (S.D.N.Y. 1964).

in New York dismissed the complaint, while in the other case[3] a District Court in California entered judgment holding the statute unconstitutional. The two actions were consolidated on appeal. HELD: Judgement in the California case affirmed. A statute requiring the Post Office Department to detain and destroy unsealed communist political propaganda from foreign countries, unless the addressee returns a reply card indicating his desire to receive such mail, is unconstitutional because it requires an official act, the card's return, which is a limitation of addressee's first amendment rights. *Lamont v. Postmaster General,* 85 Sup. Ct. 1493 (1965).

The very purpose of the first amendment is to prevent public authority from assuming guardianship of the public mind through regulating the press, speech, and religion.[4] The freedoms of speech and press have broad scope. The authors of the first amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if enlightened government was ever to triumph.[5] This freedom embraces the right to distribute literature and necessarily protects the right to receive it.[6] The courts have said that discussion is a political duty and have realized that human institutions are subject to human risks, but that it is dangerous to discourage thought, hope, and imagination.[7] Such discouragement breeds repression; "repression breeds hate," and "hate menaces stable government . . . . Believing in the power of reason as applied through public discussion . . . ." we must guard against a silence that is coerced by law.[8] Inhibition as well as prohibition of the exercise of first amendment rights is a power which has often been denied to the federal government.[9] However, the maxim that the peace, good order, and comfort of the community may imperatively require regulation of time, place, and manner of distribution of literature must be considered.[10] This standard is in accord with the principle that only a compelling governmental interest in the regulation of a subject, within governmental power to regulate, can justify limiting first amendment freedoms.[11]

An affirmative official act which prevents the unfettered exercise of first amendment rights has often been held to be unconstitutional. Where a municipal ordinance required religious colporteurs to pay a license tax as a condition to the pursuit of their activities, the ordinance was struck down as a denial of the freedoms of speech, press, and religion.[12] A requirement imposed on a labor union organizer to register before making a speech was said to be incompatible with first amendment rights.[13] Where a city ordinance forbade as a nuisance the distribution by hand or otherwise, of literature of any kind without first obtaining per-

[3]Heilberg v. Fixa, 236 F. Supp. 405 (N.D. Cal. S.D. 1964).

[4]*E.g.*, Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

[5]*E.g.*, Martin v. Struthers, 319 U.S. 141, 143 (1943).

[6]*Id.* at 141.

[7]See Whitney v. California, 274 U.S. 357, 375 (1927).

[8]*Id.* at 375-76 (Brandeis, J., concurring).

[9]Lamont v. Postmaster General, 85 Sup. Ct. 1493 (1965).

[10]*E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

[11]*E.g.*, N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1963).

[12]Murdock v. Pennsylvania, 319 U.S. 105, 108-10 (1943).

[13]*E.g.*, Thomas v. Collins, 323 U.S. 516, 540 (1945).

mission from the city manager, the ordinance was held[14] to violate the fourteenth amendment. It was said to "strike at the very foundation of freedom of the press by subjecting it to license and censorship."[15] Denials of absolute freedoms have been upheld as reasonable in times of great danger to national security. When a newspaper admitted to the second class privilege publishes non-mailable matter (publication violating the Espionage Law) so frequently as to justify the presumption that it will continue to do so, the Postmaster General is empowered to revoke the privilege indefinitely subject to the publisher's right to secure a renewal.[16] During World War I the second class privilege, previously granted for a newspaper, was revoked by the Postmaster General upon due notice and hearing.[17] From the time the United States entered the World War to the time of revocation, the paper had frequently printed articles conveying false reports and statements with intent to promote the success of the enemies of the United States. It attempted to cause disloyalty and refusal of duty in the military and naval forces and tried to obstruct the recruitment and enlistment service. The publication was clearly a violation of the Espionage Law and the revocation of mailing privileges was held[18] not to deprive the publisher of constitutional rights of free speech, free press, or of property without due process of law.

The statute in the instant case requiring the return of a reply card might have a deterrent effect, as to receiving mail containing communist political propaganda, on those persons in sensitive positions whose livelihood might be dependent on a security clearance. Public officials might fear they would invite disaster if they read what the federal government says contains the "seeds of treason."[19] This effect of the statute is at war with the uninhibited, robust, and wide open debate and discussion which the first amendment demands.[20] This conclusion must be weighed along with the fact that a compelling governmental interest, such as war, may justify limiting first amendment freedoms to the extent of withholding communist political propaganda from American citizens. The apparent conflict between congressional power to regulate the postal system, and its inability to enact postal regulation which tends to inhibit or deter the exercise of first amendment rights must, in the final analysis, be resolved by balancing the legitimate legislative purposes served by the statute against the restrictions imposed on rights otherwise guaranteed by the first amendment.[21]

Floyd M. Davis, Jr.

---

[14]Lovell v. City of Griffin, 303 U.S. 444 (1938).

[15]See *Id.* at 541.

[16]United States *ex rel.* Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 416 (1921).

[17]*Id.* at 408.

[18]*Id.* at 409-15.

[19]Lamont v. Postmaster General, 85 Sup. Ct. 1493 (1965).

[20]*Id.* at 1496-97.

[21]Heilberg v. Fixa, 236 F. Supp. 405, 408 (N.D. Cal. S.D. 1964).

Constitutional Law—Mapp Exclusionary Rule Not To Be Applied Retroactively

The petitioner was convicted in Louisiana, in 1959, of simple burglary. Evidence leading to his conviction was obtained through an illegal search of petitioner's home and business. Subsequently, the Supreme Court's decision in *Mapp v. Ohio*[1] held evidence obtained in an illegal search to be inadmissible in a state court. Petitioner filed an application for habeas corpus in the state court and then in the United States District Court. Both courts denied his application, and the district court's decision was affirmed.[2] The Court of Appeals held the exclusionary doctrine of *Mapp* was not retrospective as far as convictions finalized prior to it were concerned. The Supreme Court granted certiorari. Held: Affirmed. The purpose of *Mapp*, to deter illegal police action in the securing of evidence and to enforce the fourth amendment of the Constitution, would not be advanced by a retrospective application of *Mapp* to convictions finally decided prior to its rendition, and it is therefore not retroactive. *Linkletter v. Walker*, 85 Sup. Ct. 1731 (1965).

In the absence of a clear or express holding to the contrary, there is usually an assumption that a constitutional decision is retroactive, even if it is an overruling decision.[3] This assumption has been followed and an overruling decision was retroactively applied to a case pending at the time the overruling decision was rendered.[4] Not only have decisions been applied retroactively to pending cases, but statutory changes,[5] constitutional amendments,[6] and treaties[7] have all been applied to cases not final at the time of their enactment. In *Eskridge v. Washington Prison Bd.*,[8] a constitutional decision was applied retroactively to a case that had been finally decided. It has been contended that a decision holding a state statute unconstitutional should not be applied retroactively, and the statute should give validity to official conduct taken pursuant to it before the announcement of unconstitutionality.[9] This argument and extensions of it are refuted by the classic statement in *Norton v. Shelby County*,[10] that "an unconstitutional act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Although the language in the *Norton* decision is explicit, a number of state decisions have abandoned this doctrine of retroactive application of a judicial decision and have held decisions to be prospective.[11] This judicial technique is consistent with

---

[1]367 U.S. 643, 655 (1961).

[2]Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963).

[3]Bender, *The Retroactive Effect on an Overruling Decision: Mapp v. Ohio*, 110 U. Pa. L. Rev. 650 (1962).

[4]*E.g.*, Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941).

[5]Carpenter v. Wabash Ry., 309 U.S. 23 (1940).

[6]United States v. Chambers, 291 U.S. 217 (1934).

[7]United States v. Schooner Peggy, 1 U.S. (1 Cranch) 358 (1801).

[8]357 U.S. 214 (1958).

[9]See Norton v. Shelby County, 118 U.S. 425, 442 (1886).

[10]*Ibid.*

[11]*E.g.*, Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89, 97 (1959).

the due process clause of the constitution,[12] and possibly because of the states' attitude toward this procedure, the Supreme Court has limited absolute federal case retroactivity by such statements as,

> The past cannot always be erased by a new judicial declaration. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects . . . . It is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.[13]

In 1914 the Court recognized the inadmissibility in a federal court of evidence, illegally seized by federal officers.[14] Thirty-five years later this doctrine was extended to the states by the ruling[15] that one's right to privacy against arbitrary police intrusion was at the core of the fourth amendment, was basic to a free society, and was enforceable against the states through the due process clause of the fourteenth amendment. The method of enforcement of this basic right was, however, left to the states with few guidelines.[16] Convictions brought about by methods that offend a sense of justice[17] and circumstances where officials used force to overcome a suspect's resistance[18] have been held to be a violation of due process, and evidence obtained as a result of these acts has been ruled to be inadmissible in the state courts. In 1961 *Mapp v. Ohio*[19] held "all evidence obtained by searches and seizures in violation of the Constitution is, by that authority, inadmissible in a state court." Since the rendition of the *Mapp* decision, a split of authority has developed over its prospectiveness or retroactivity. Not only have the courts failed to agree on the retroactive or prospective application of the *Mapp* doctrine, but courts agreeing on this issue have advanced different reasons for their decisions. One doctrine used by the courts in deciding this issue was that of waiver. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[20] Defendants whose cases were still pending or otherwise not final at the time *Mapp* was decided were given the benefit of *Mapp's* exclusionary doctrine, provided they objected during trial to the admission of the unlawfully obtained evidence.[21] A failure to object constituted a waiver of the defendant's constitutional right to prevent admission of such evidence under the *Mapp* rule.[22] A different result was reached concerning a trial that was final prior to the *Mapp* decision.[23] Here a failure to object to the admission of illegally seized evidence was ruled not to be a waiver. The court reasoned

[12]Great No. Ry. v. Sunburst Oil & Ref. Co., 287 U.S. 358 (1932).

[13]Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940).

[14]Weeks v. United States, 232 U.S. 383, 398 (1914).

[15]Wolf v. Colorado, 338 U.S. 25 (1949).

[16]See, *e.g.*, *Ibid.*

[17]Rochin v. California, 342 U.S. 165 (1952).

[18]Breithaupt v. Abram, 352 U.S. 432 (1957).

[19]367 U.S. 643, 655 (1961).

[20]Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[21]*E.g.*, Fahy v. Connecticut, 375 U.S. 85 (1963).

[22]United States v. Mahan, 233 F. Supp. 1 (D.N.J. 1964).

[23]*E.g.*, Walker v. Peppersack, 316 F.2d 119 (4th Cir. 1963).

that had the defendant objected to the admission of such evidence, the objection would certainly have been overruled on the basis of *Wolf v. Colorado*.[24] Thus, such a failure could not be an intentional abandonment of the constitutional right to object. In states that have their own exclusionary rule, it has been held[25] that the failure to object, even though the case was final prior to *Mapp*, amounted to a waiver. Generally, before a state-convicted prisoner is entitled to a post-conviction remedy such as federal habeas corpus, he must have exhausted all his state remedies, or there must be an absence of available state corrective processes, or circumstances rendering such processes ineffective to protect the rights of the prisoner.[26] For this reason the retrospective application of *Mapp* has been denied to defendants who have not exhausted their state remedies.[27] Retroactive application of *Mapp* has also been refused in cases where there was no "unfairness" to the defendant or doubt as to the reliability of the evidence illegally obtained.[28] The court reasoned in this case that the public had an interest in seeing such convictions executed. It has also been held[29] that searches which took place prior to the search in the *Mapp* case, which were illegal according to *Mapp* but legal under the state's own exclusionary rule, were not grounds for a post-conviction remedy.

In many constitutional decisions the holding is not the most important derivative; the criteria used in arriving at that holding is. The significant aspect of the principal decision, in addition to ending the relative uncertainty of the application of *Mapp* prospectively or retroactively, is the criteria used in ruling *Mapp* not to be retroactive. Since there was no clear expression of intent by the Court in *Mapp* as to the retroactivity of its decision, the determination of the question was made to a degree by considering the effect of a retroactive application of the *Mapp* decision upon the furtherance of *Mapp's* purpose. The imputed purpose of the *Mapp* decision was to guarantee the fourth amendment freedom from unreasonable searches and seizures by removing the incentive to commit such a search or seizure. It was felt by the Court in the instant case that this purpose would not be advanced by applying *Mapp* retroactively. The Court, apparently, gave little weight to the fact that there are persons now in jail serving sentences for convictions obtained through a denial of their constitutional rights. It would seem that if the *Mapp* rule is to be made available, it should be afforded to all accused regardless of the date of their trial. This writer has difficulty in reconciling different constitutional standards based on such a criterion as an arbitrary date.

Frank Thackston, Jr.

---

[24]338 U.S. 25 (1949).

[25]*E.g.*, Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964).

[26]*E.g.*, Whitley v. Steiner, 293 F.2d 895 (4th Cir. 1961).

[27]*E.g.*, Gregory v. New York, 195 F. Supp. 527 (N.D.N.Y. 1961).

[28]See United States *ex rel.* Angelet v. Fay, 333 F.2d 12, 20 (2d Cir. 1964).

[29]Sisk v. Lane, 331 F.2d 235 (7th Cir. 1964).

CONSTITUTIONAL LAW—MISCEGENATION—
EQUAL PROTECTION OF THE LAWS

Defendants, a Negro male and white female, were convicted under a Florida statute[1] which proscribed illicit interracial cohabitation. The state supreme court affirmed, whereupon the Supreme Court granted certiorari. HELD: Reversed. A statute which is violated only when the prohibited deed is performed by a couple composed of a Negro and a white is a denial of equal protection of the laws as guaranteed by the fourteenth amendment; it is therefore invalid. *McLaughlin v. Florida*, 85 Sup. Ct. 283 (1964).

The prohibition against denial of equal protection of the laws has exclusive reference to state action, and does not pertain to private acts of discrimination.[2] Nevertheless, the use of the judicial power of the state to enforce private discriminatory agreements has been held to breach the equal protection clause.[3] The clause operates to provide equal access to,[4] and to prevent inequality of treatment in,[5] the courts of the states. It demands that criminal justice impose no higher or different punishment upon one than is provided for all for similar transgressions.[6] Equal protection of the laws has been interpreted as meaning the "protection of equal laws."[7] This requires the states to have the same law applicable to black and white, for they are considered equal before the law.[8] Legislation which affects persons similarly situated by discriminating against one class while favoring others, is forbidden by the clause.[9] The requirement of like application to all similarly situated does not prohibit the state from prescribing reasonable classifications,[10] but these distinctions must be based on some difference which is rationally related to the purpose of the classification; they may never be arbitrary.[11] If the classification is based solely on race it is constitutionally suspect and warrants scrutiny by the Court.[12] The equal protection clause has been used effectively by the Negro in most of his major advances and understandably so, because it is a safeguard against prohibited unfairness[13] and was designed primarily for the Negro.[14] In the field of housing, state enforcement of restrictive covenants was held to be a denial of equal protection.[15] Additional advances were provided by the equal protection clause in eradicating segregation from the area of municipal facilities.

---

[1]FLA. STAT. ANN. § 798.05 (1965).
[2]Virginia v. Rives, 100 U.S. 313, 318 (1879).
[3]See, *e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948).
[4]Traux v. Corrigan, 257 U.S. 312, 334 (1921).
[5]See Neal v. Delaware, 103 U.S. 370 (1880).
[6]Barbier v. Connolly, 113 U.S. 27 (1885).
[7]Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).
[8]Buchanan v. Warley, 245 U.S. 60, 77 (1917).
[9]Minneapolis & St. L. Ry. v. Beckwith, 129 U.S. 26, 28-29 (1889).
[10]See, *e.g.*, Barrett v. Indiana, 229 U.S. 26 (1913).
[11]See, *e.g.*, Gulf, Colo. & S. F. Ry. v. Ellis, 165 U.S. 150, 155 (1897).
[12]Korematsu v. United States, 323 U.S. 214, 216 (1944).
[13]Bolling v. Sharpe, 347 U.S. 497 (1954).
[14]Buchanan v. Warley, 245 U.S. 60, 77 (1917).
[15]Shelley v. Kraemer, 334 U.S. 1 (1948).

This move effected the following public concerns: golf courses,[16] swimming pools,[17] courthouse cafeterias,[18] parks,[19] beaches,[20] housing,[21] athletic contests,[22] and court rooms.[23] Jury duty was brought under the equal protection clause by a decision which held that jury commissioners are under a duty to refrain from basing their selection of jurors on racial grounds,[24] and that if a process of systematic exclusion is followed in a trial of a Negro the Court will reverse the conviction and order a new trial.[25] The equal protection clause was resorted to in the desegregation of restaurants. The courts making this application held that state action in denying equal protection is manifested when a restaurant proprietor refuses to serve Negroes in obedience to a segregation law,[26] or in conformance with the policy of local authorities.[27] The education cases are another example of the utilization of the equal protection clause by the Negro race. The abrogation of the "separate but equal" doctrine in *Brown v. Board of Education*[28] was the pivotal point in this line of decisions.

The foregoing decisions, involving the Negro's application of the equal protection clause to procure his cviil rights, illustrate how this clause has been expanded to meet the exigencies of the time. They also serve to elucidate the progression of the equal protection clause from a point in time where a miscegenation statute was favorably construed,[29] to the present judicial attitude toward similar statutes.[30] In the case of *Pace v. Alabama*,[31] the Court construed a state statute which proscribed illicit miscegenetic cohabitation. A conviction under that statute was declared not contrary to the fourteenth amendment because the same quantum of punishment was provided for each race. This reasoning prevailed notwithstanding the Court's earlier ruling[32] that the fourteenth amendment denied the states the power to withhold from colored people the equal protection of the laws. Although *Pace* remained in effect for eighty-two years, the Court gradually weakened without destroying it by eroding the basic premise of the case. No

---

[16]Holmes v. City of Atlanta, 223 F.2d 93 (5th Cir. 1955), *aff'd mem.* 350 U.S. 879 (1955).

[17]City of St. Petersburg v. Alsup, 238 F.2d 830 (5th Cir. 1956).

[18]Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956).

[19]Beal v. Holcombe, 193 F.2d 384 (5th Cir. 1951).

[20]See, *e.g.*, City of Baltimore v. Dawson, 220 F.2d 386 (4th Cir. 1955), *aff'd mem.* 350 U.S. 877 (1955).

[21]See, *e.g.*, Housing Authority of San Francisco v. Banks, 260 P.2d 668 (Cal. 1953).

[22]State Athletic Comm'n v. Dorsey, 168 F. Supp. 149 (E.D. La. 1958), *aff'd mem.* 359 U.S. 533 (1959).

[23]Johnson v. Virginia, 373 U.S. 61 (1963).

[24]Virginia v. Rives, 100 U.S. 313, 322 (1879).

[25]See, *e.g.*, Hale v. Kentucky, 303 U.S. 613 (1938).

[26]See Peterson v. City of Greenville, 373 U.S. 244 (1963).

[27]See Lombard v. Louisaina, 373 U.S. 267 (1963).

[28]347 U.S. 483, 495 (1954).

[29]See Pace v. Alabama, 106 U.S. 583 (1882).

[30]See McLaughlin v. Florida, 85 Sup. Ct. 283 (1964).

[31]106 U.S. 583 (1882).

[32]Strauder v. West Virginia, 100 U.S. 303 (1879).

statute punishing premarital or extramarital interracial intercourse was construed until the rendition of the decision in the principal case. A case[33] involving a similar statute was presented but the Court refused to hear it by denying certiorari. The Court in *McLaughlin* did not specifically overrule *Pace* but did observe that it represented a "narrow view"[34] of the equal protection clause which had not "withstood analysis in subsequent decisions."[35] There is an intimation in the decision that if a state could show an overriding statutory purpose[36] requiring the racial proscription, the statute might be held valid. But two Justices joined in a concurring opinion[37] to specifically attack this line of reasoning.

The invalidating of the Florida statute will directly affect six States, including Mississippi, which have similar statutes.[38] The original Mississippi statute had been held not to apply to interracial primiscuity,[39] but a recent amendment[40] to this section was expressly designed to include this offense. The section now punishes cohabitation and a single act of adultery or fornication between persons prohibited to marry by reason of race or blood, when the marriage is proclaimed to be unlawful and void. Miscegenetic marriages are declared to be unlawful and void by section 459 of the present code. The statute prohibits two distinct offenses—incest and interracial promiscuity. The logical result of *McLaughlin* will be to render the interracial promiscuity part of the statute invalid. This section will be subverted because of the difficulty in showing the required overriding statutory purpose for the racial classification. The opinion of the majority in *McLaughlin*, while invalidating the statute forbidding miscegenetic cohabitation, expressly avoided the issue of statutes proscribing miscegenetic marriages. However, one Justice, perhaps prophetically, called for their dispatch in his concurring opinion.[41] Certainly, after considering the principal case, recent legislative enactments,[42] and more important, the present political and sociological quandary, no one can gainsay the probability that the life expectancy of these statutes will be short.

George M. Fleming

---

[33]Jackson v. Alabama, 37 Ala. App. 519, 72 So. 2d 114 (1954).

[34]85 Sup. Ct. 283, 287 (1964).

[35]*Id.* at 286.

[36]See *id.* at 289.

[37]*Id.* at 291-92 (Stewart, J., Douglas, J., concurring).

[38]See ALA. CODE, tit. 14 § 360 (1959); ARK. STAT. ANN. § 41-806 (1948); FLA. STAT. ANN. § 798.04 (1965); LA. REV. STAT. ANN. § 14:79 (1950); MISS. CODE ANN. § 2000 (Supp. 1964); VA. CODE ANN. § 18.1-191 (1960).

[39]See Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728 (1958); Rose v. State, 234 Miss. 731, 107 So. 2d 730 (1958).

[40]See Miss. Laws 1960, ch. 240.

[41]85 Sup. Ct. 283 (Harlan, J., concurring).

[42]See generally The Civil Rights Act of 1964, 78 Stat. 241 (1964), 42 U.S.C.A. 1971, 1975a-75d, 2000a (1964).

CONSTITUTIONAL LAW—TELEVISED TRIAL VIOLATES DEFENDANT'S RIGHTS UNDER FOURTEENTH AMENDMENT

Petitioner, Billie Sol Estes, was convicted of swindling in a heavily publicized criminal trial. Over his objection the pre-trial hearing and portions of the trial were carried live over radio and television. Petitioner claimed that by allowing his trial to be televised and broadcast he was denied due process of law under the fourteenth amendment. The Texas Court of Criminal Appeals affirmed his conviction. HELD: Reversed. In a criminal prosecution the televising and broadcasting of the trial is a denial of due process of law under the fourteenth amendment. *Estes v. Texas*, 85 Sup. Ct. 1628 (1965).

Under the English common law publishers of out-of-court statements which tended to obstruct the orderly and equitable administration of justice were severely punished.[1] Pennsylvania was the first American jurisdiction to encounter this problem when a newspaper editor commented on a pending case and was cited for contempt.[2] The Judiciary Act of 1789[3] gave federal courts the power to punish by fine or imprisonment publications which reflected on the court or tended to influence pending litigation. American courts have long recognized the right to punish for interference with judicial proceedings.[4] This right was extended in *Toledo Newspaper Co. v. United States*,[5] when the Court said that publishers of prejudicial comments could be punished if such comments had a reasonable tendency to obstruct justice in that the accused was denied a fair and imparital hearing. In a trio of contempt by publication cases,[6] not involving jury trials, the Court discussed the permissible scope of newspaper comment regarding pending litigation. The reasonable tendency rule announced in *Toledo* was discarded for a rule more favorable to freedom of the press. Under the new rule accounts and comments of the news media preceding and during the trial were held not to be a denial of the accused's right to due process, unless such accounts and comments created a clear and present danger[7] to the accused's rights and were of an extremely serious nature.[8] The Court further held that what transpires from a courtroom is public property, and there is no special power conferred on the courts which allow them to suppress or censor these proceedings.[9] A heretofore unbridled press was somewhat restrained in a series of trial-by-newspaper cases. In *Stroble v. California*[10] the Court indicated that if newspaper accounts prejudiced a community to the extent that the accused was necessarily prevented from receiving a fair trial, due process would be denied. The dissenting opinion announced that con-

[1]Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 885, 886-87 (1935).

[2]Respublica v. Oswald, 1 U.S. (1 Dall.) 319 (1788).

[3]1 Stat. 73 (1789).

[4]*E.g.*, *Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873).

[5]247 U.S. 402, 421 (1917).

[6]Craig v. Harney, 331 U.S. 367 (1947); Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).

[7]Briges v. California, 314 U.S. 252, 261 (1941).

[8]Pennekamp v. Florida, 328 U.S. 331, 334 (1946).

[9]Craig v. Harney, 331 U.S. 367, 374 (1947).

[10]343 U.S. 181, 193 (1952).

victions rendered in the light of inflammatory press articles offended civilized conceptions of due process.[11] *Irvin v. Dowd*[12] was the first state conviction reversed by the Supreme Court solely on the ground of adverse pre-trial publicity. The concurring opinion[13] emphasized that the guilt of the accused was to be proved by the state solely on the basis of evidence produced by fair procedure in the dignity of the courtroom. A just verdict cannot be reached by jurors whose minds have been biased by press, radio, and television for months preceeding the trial.[14] In the first case to come before the Court directly involving television, a televised confession, seen and heard by thousands in the community where the trial was conducted, was held to be a denial of the accused's basic rights.[15] The Court said a trial after such a telecast was nothing more than a hollow formality.[16]

Today's compact and mobile radio and television equipment allows coverage of all newsworthy events. Amidst the demands of the public for the sensational, the nation's courts have been beset with requests to allow trials to be televised and broadcast.[17] The conduct of the press in Dallas, Texas, during the events which surrounded the assassination of President Kennedy in 1963 prompted a recommendation from the Warren Commission that the news media practice ethical standards in all phases of news coverage so as not to interfere with the rights of the accused to a fair and impartial trial.[18] At present only two states, Texas[19] and Colorado,[20] allow court proceedings to be televised and broadcast at the discretion of the trial judge. In Judicial Canon 35[21] the American Bar Association has recommended that the photographing, broadcasting, or televising of court proceedings be forbidden; Rule 53 of the Federal Rules of Criminal Procedure expressly prohibits such broadcasts in the federal courts. In Mississippi the televising or broadcasting of trials is not prohibited by statute[22] or by trial court rules.[23] Recent Mississippi contempt cases[24] indicate a reluctance on the part of the Mississippi Supreme Court to punish by contempt prejudicial comments and newspaper articles. The Missis-

[11] *Id.* at 201 (Frankfurter, J., dissenting).

[12] 366 U.S. 717 (1961).

[13] *Id.* at 729 (Frankfurter, J., concurring).

[14] *Id.* at 729-30.

[15] Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

[16] *Ibid.*

[17] Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960).

[18] WARREN COMMISSION, A REPORT ON THE ASSASSINATION OF PRESIDENT KENNEDY 47 (1964).

[19] Estes v. Texas, 85 Sup. Ct. 1628, 1670 (1965).

[20] *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465 (Colo. 1965).

[21] See generally Tinkham, *Should Canon 35 Be Amended? A Question of Proper Judicial Administration*, 42 A.B.A.J. 843 (1956).

[22] MISS. CODE ANN. §§ 1152, 1656 (1956).

[23] See 23 MISS. L.J. 223, 235 (1951).

[24] See Evers v. State, 241 Miss. 560, 131 So. 2d 653 (1961); Sullens v. State, 191 Miss. 856, 4 So. 2d 356 (1941).

sippi court has held that freedom of speech includes the right to speak unwisely and to be vulgar.[25]

It remains to be seen whether prejudicial interference by the news media will be lessened by the *Estes* decision. The case indicates that the Court is de-emphasizing freedom of speech and freedom of the press in favor of a rule which will preserve the right of an accused to a fair trial. The televising of trials could turn the courtroom into a nation-wide arena, thereby destroying the historic concept of a trial as a dignified gathering for the imparital administration of justice. Recent events in Mississippi have been given national press, radio, and television coverage and have prompted numerous comments from the news media concerning our courts and our citizenry. In view of the above, Mississippi should possibly take steps to enact legislation forbidding outside interference with the judicial process. The English courts have adopted a strict rule regarding contempt and have virtually eliminated prejudicial interference by the news media.[26] This rule could well serve as a guide for similar Mississippi legislation. In England, "Any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts is a contempt of Court."[27]

Robert K. Upchurch

Constitutional Law—Right To Be Advised of the Right To Counsel—State Misdemeanor Prosecutions

The defendant's home was searched by county officials and found to contain intoxicating liquor. He was promptly arrested, jailed for illegal possession of intoxicating liquor,[1] and released on bond. Subsequently the accused, very informally, entered a plea of guilty before the local justice of the peace, and requested that he be allowed to pay his fine. The justice refused to set any penalty until court day, at which time the defendant was given the maximum prescribed sentence of ninety days in jail and a $500 fine. Approximately forty-three days later a mittimus for the defendant's arrest was issued and shortly thereafter he was jailed. With the prescribed period for appeal having expired,[2] the defendant's attorneys, retained after his incarceration, filed a motion in the state supreme court for leave to file a petition for a writ of error coram nobis in the trial court. The supreme court subsequently dismissed the motion.[3] Defendant, meanwhile, filed in the federal district court a removal petition which included a prayer for a writ of habeas corpus. The district court, on jurisdictional grounds, remanded the cause to the justice court and denied the prayer for habeas corpus as petitioner had not exhausted state remedies. From the decision denying the petition and the prayer, the defendant appealed. Held:

[25]Sullens v. State, 191 Miss. 856, 871, 4 So. 2d 356, 362 (1941).

[26]Comment, 36 Miss. L.J. 369, 372 (1965).

[27]The Queen v. Gray [1900] 2 Q.B. 36, 40.

[1]Miss. Code Ann. § 2613 (1956).

[2]Miss. Code Ann. § 1202 (1956).

[3]Harvey v. State, 168 So. 2d 49 (Miss. 1964).

Reversed and remanded. A federal court, having jurisdiction over cases in which all state remedies have been exhausted, has the authority to require that a misdemeanant be advised of his right to counsel in state tribunals. *Harvey v. State,* 340 F.2d 263 (5th Cir. 1965).

The various elements of the sixth amendment requirement of right to counsel have evolved from numerous court decisions.[4] The "right to be advised" aspect of the basic right to counsel was initially intimated by the Supreme Court in a decision which declared it the duty of federal courts to determine whether an accused felon, indicted for a federal offense, had waived his right to counsel by pleading not guilty.[5] The duty to advise felons of their right to counsel in federal courts was emphasized by the Court in a case holding that a guilty plea was not necessarily a waiver of a defendant's right to counsel.[6] The Court again indicated the necessity of advising a defendant accused of a federal offense of his right to counsel when it ordered a new trial for a felon who had not been advised that he could have counsel appointed.[7] The right to be advised concerning counsel was not extended to federal misdemeanor prosecutions until *Evans v. Rives.*[8] In the *Evans* case, the defendant, at arraignment, was not informed of his right to counsel, and upon being sentenced to prison he petitioned for a writ of habeas corpus. The court of appeals, granting the petition, reiterated the *Johnson v. Zerbst*[9] requirement that an accused be advised of his right to counsel and further declared that this right extended to federal misdemeanor cases, because "the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one."[10] The right to be advised of the right to counsel was subsequently made a part of the Federal Rules of Criminal Procedure.[11] Beginning with *Powell v. Alabama,*[12] the federal courts gradually extended the various safeguards of the sixth amendment right to counsel to state capital and non-capital criminal proceedings.[13] Among the extended safeguards was the right to be advised of the right to counsel.[14] However, not until the present decision has this right embraced state misdemeanor prosecutions.

Prior to the extension of this federal shield to state prosecutions, early indications were that state tribunals would not, by their own initiative, recognize a misdemeanant's right to be advised concerning counsel. An Ohio court denied that the right to be advised extended to the municipal courts of that jurisdiction.[15] Another early decision[16]

[4]See generally BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS (1955).

[5]Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

[6]Walker v. Johnston, 312 U.S. 275, 286 (1941).

[7]Glasser v. United States, 315 U.S. 60, 71 (1942).

[8]126 F.2d 633 (D.C. Cir. 1942).

[9]304 U.S. 458 (1938).

[10]Evans v. Rives, 126 F.2d 633, 638 (D.C. Cir. 1942).

[11]FED. R. CRIM. P. 44.

[12]287 U.S. 45 (1932).

[13]See generally HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951).

[14]See, *e.g.*, Rice v. Olson, 324 U.S. 786 (1945).

[15]State v. Stewart, 38 Ohio L. Abs. 543, 50 N.E.2d 910 (Ct. App. 1943).

[16]State *ex rel.* Copeland v. Warden of Md. House of Correction, 194 Md. 717, 70 A.2d 813 (1950).

refused to recognize even the right to an arraignment in misdemeanor cases, although this same jurisdiction now requires its judges to advise all defendants of their right to counsel.[17] At least one state court definitely concluded that "the court as a matter of law is under no duty to advise an accused [misdemeanant] of his right to counsel."[18] Some states, while not denying the right to be advised to *all* misdemeanants, have restricted the duty of their courts to advise an accused. By declaring that traffic violations are not "criminal" proceedings,[19] New York at one time limited its statutory provision requiring counsel in all "criminal" cases. This semantic distinction was recently rejected.[20] An Illinois tribunal refused to recognize the duty to advise all misdemeanants of their right to counsel by limiting the terms of the statute upon which the right to be advised was based.[21] On the other hand, several jurisdictions have actively recognized the duty to advise defendants of their right to counsel. Two earlier contrary cases[22] were distinguished in a Minnesota decision declaring that prosecutions for violations of traffic regulations were "criminal prosecutions," and failure to advise the violators of their right to counsel in such cases was reversible error.[23] Even in prosecutions for minor offenses, "below the grade of misdemeanor," New Jersey requires that the accused be advised of his right to counsel.[24] Not only do misdemeanants in one Midwestern state have the right to be advised concerning counsel, but in indigency cases, even prior to *Gideon v. Wainwright*,[25] counsel had to be appointed or the conviction would be reversed for lack of due process.[26] An examination of recently changed state policies toward misdemeanor prosecutions indicated the extent to which the correlation between the right to be advised and appointment of counsel in indigency cases was recognized. The *Gideon* decision was instrumental in causing an enlightened change of state policy toward indigents, misdemeanants, and criminal justice in general. An example of that decision's catalytic effect upon state legislative policy is Vermont's requirements that misdemeanants be advised of their right to counsel and that indigent defendants have counsel appointed when the punishment could be imprisonment for six months or more.[27] By judicial decision, the Arizona Supreme Court has instituted essentially the same requirements as those of Vermont, except counsel will be appointed only for indigent misdemeanants charged with "serious offenses."[28] California has ex-

---

[17]Taylor v. State, 230 Md. 1, 185 A.2d 197 (1962).

[18]State v. Healy, 24 Conn. Supp. 15, 185 A.2d 289, 290 (Cir. Ct. App. Div. 1962).

[19]Lea v. Macduff, 126 N.Y.S.2d 646 (Sup. Ct. 1953).

[20]People v. Kohler, 258 N.Y.S.2d 279 (App. T. 1965).

[21]People v. Howard, 41 Ill. App. 2d 128, 190 N.E.2d 3 (1963).

[22]State v. Martin, 223 Minn. 414, 27 N.W.2d 158 (1947); State *ex rel.* Weich v. City of Red Wing, 175 Minn. 222, 220 N.W. 611 (1928).

[23]State v. Moosbrugger, 263 Minn. 56, 116 N.W.2d 68 (1962).

[24]*In re* Garofone, 80 N.J. Super. 259, 193 A.2d 398, 405-06 (Super. Ct. 1963).

[25]372 U.S. 335 (1963).

[26]Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).

[27]Vt. Stat. Ann. tit. 13, § 6503 (Supp. 1963).

[28]State v. Anderson, 96 Ariz. 123, 392 P.2d 784 (1964).

tended to misdemeanor prosecutions its constitutional[29] and penal code[30] provisions for advising defendants of their right to counsel and appointing counsel in indigency cases.[31] There are no known cases indicating Mississippi's policy toward the misdemeanant's right to be advised concerning counsel, although it has been held[32] that misdemeanants must have the indictment fully explained to them. In another indicative Mississippi case,[33] concerning possession of intoxicating liquor, the accused was allowed only five minutes to confer with his counsel prior to a trial on the merits. The supreme court reversed the conviction because of a lack of "due regard to the rights of defendants."[34] This state's policy with regard to advising felons of their rights has been clearly expressed,[35] and the *Gideon* mandate for appointment of counsel has also been adhered to in felony cases.[36]

Few of the state court decisions have faced the problem of determining when the right to be advised of the right to counsel accrues, although they imply that such right should be explained prior to the defendant's entering a plea. There are some guidelines for solving this problem in a recent Supreme Court decision.[37] The question of whether the accused had waived his right to counsel was present in only a few of the discovered misdemeanor cases,[38] even though felons have caused appellate courts to resolve this query numerous times.[39]

The instant case, in its narrowest sense, without regard for the policy behind the holding, requires only that misdemeanants be informed of their right to counsel. Since indigency was not a consideration, the court of appeals did not distinguish between the right to retain counsel and the right to have counsel appointed. Had the court of appeals explicitly required Mississippi to appoint counsel, this jurisdiction would have been unable to pay counsel, for at the present time there is no statute which authorizes compensation for attorneys who defend indigent misdemeanants. Mississippi has provided for the defense of indigent felons.[40] The *Harvey* decision, like the majority of state decisions in this area, does not specify when the accused misdemeanant must be advised of his right to counsel, but it can be inferred that it must be done at least prior to his entering a plea. There was no indication whether the decision in the principal case would be retroactive or not, but since *Gideon* has been declared retrospective,[41] so may *Harvey*. With regard to Mississippi criminal law, all of the

[29]CAL. CONST. art. 1, § 13.

[30]CAL. PEN. CODE § 858.

[31]*In re* Johnson, 398 P.2d 420 (Cal. 1965).

[32]Brown v. State, 103 Miss. 664, 60 So. 727 (1913).

[33]Cruthirds v. State, 190 Miss. 892, 2 So. 2d 145 (1941).

[34]*Id.* at 898, 2 So. 2d at 146.

[35]Lambert v. State, 245 Miss. 227, 147 So. 2d 480 (1962).

[36]Clarke v. State, 251 Miss. 627, 170 So. 2d 575 (1965); Conn. v. State, 251 Miss. 488, 170 So. 2d 20 (1964).

[37]Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964).

[38]*In re* Johnson, 398 P.2d 420 (Cal. 1965).

[39]*E.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938).

[40]MISS. CODE ANN. § 2505 (Supp. 1964).

[41]United States *ex rel.* Durocher v. LaVallee, 330 F.2d 303, 311 (2d Cir. 1964).

above mentioned problems must, and will, be decided by either federal or Mississippi courts. It is submitted, therefore, that this jurisdiction take positive steps to protect the rights of misdemeanants, indigent or not, by requiring higher standards of judicial procedure in its courts. The recent legislation[42] requiring training courses for all justices of the peace is an excellent beginning. It is further submitted that the Mississippi Bar, judiciary, and legislature study the programs initiated by sister states which provide for appointment of counsel in indigent misdemeanor prosecutions. Although the appointment of counsel has not been required thus far, the trend in recent Supreme Court decisions indicates that such a requirement is highly probable. This jurisdiction could indicate its concern for criminal justice by not being in the group of states which would be forced to create a program for appointment of counsel in indigent misdemeanor prosecutions.

William M. Rainey

Constitutional Law—Sixth Amendment Right of Confrontation Applicable To The States Through The Fourteenth Amendment

Petitioner and another were arrested in Texas on a charge of robbery. At a preliminary hearing, held to determine if the matter should be presented to a grand jury, petitioner was not represented by counsel and did not attempt to cross-examine the robbery victim, who identified petitioner as the offender. After an indictment was returned, petitioner was placed on trial. Since the victim was no longer within the court's jurisdiction, the State offered the transcript of his testimony at the preliminary hearing. The prior testimony was admitted into evidence over petitioner's objection that such would deny his sixth amendment right of confrontation. The highest state court affirmed the petitioner's conviction, rejecting his claim that use of the transcript violated his rights guaranteed by the sixth and fourteenth amendments. Certiorari was granted by the Supreme Court. Held: Reversed. The sixth amendment right of confrontation in a criminal trial is a fundamental right made obligatory on the states by the fourteenth amendment and must be applied according to the standards required of federal courts. *Pointer v. Texas*, 85 Sup. Ct. 1065 (1965).

Since the 1908 case of *Twining v. New Jersey*,[1] the Supreme Court has expressly recognized that the due process clause of the fourteenth amendment to the federal constitution may encompass all of the personal rights and privileges enumerated in the first eight amendments. A difference of opinion among the justices of the Court has existed as to whether these rights are totally *incorporated* into the fourteenth amendment because they were made a part of the constitution,[2] or should be selectively *absorbed* by that amendment because they are

[42]Miss. Code Ann. § 3828-11 (Supp. 1964).

[1]211 U.S. 78, 99 (1908).

[2]See Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting).

fundamental to the concept of order liberty.[3] Mr. Justice Black's incorporation theory has not commanded a majority opinion,[4] but was expressed in a four-man dissent in *Adamson v. California*.[5] Nevertheless, the concern of the justices over procedural safeguards of the accused in criminal prosecution has led to an adoption of the selective absorption theory.[6] Thus, citing as authority the due process clause of the fourteenth amendment, the Court has required that the states conform to the federal standards in upholding the freedoms of religion,[7] speech,[8] press,[9] assembly,[10] and association[11] of the first amendment, the protection against unreasonable search and seizure[12] of the fourth amendment, the privilege against self-incrimination[13] of the fifth amendment, the right to counsel[14] of the sixth amendment, and the protection against cruel and unusual punishment[15] of the eighth amendment. Although the Supreme Court had rejected the application to the states of the sixth amendment's confrontation clause,[16] and the states had accepted that view,[17] dicta regarding the clause,[18] and recent decisions applying other provisions of the Bill of Rights to the states,[19] forecast the requirement of the instant case that state criminal proceedings conform to the federal standards protecting the right of confrontation.

Every state except Idaho has either constitutional or statutory language reflecting the sixth amendment right of confrontation.[20] A primary purpose of this right is to secure to the accused the opportunity of adequate cross-examination of witnesses against him, with physical confrontation being dispensible.[21] Although the language of the sixth amendment is absolute, the right of confrontation has traditionally been interpreted in light of the common law hearsay

---

[3]See Palko v. Connecticut, 302 U.S. 319 (1937).

[4]Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746, 747-49 (1965).

[5]332 U.S. 46, 68-125 (1947).

[6]See Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

[7]*E.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[8]*E.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925).

[9]*E.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[10]*E.g.*, De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

[11]*E.g.*, Louisiana *ex rel.* Gremillion v. NAACP, 366 U.S. 293, 296 (1961).

[12]Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[13]Malloy v. Hogan, 378 U.S. 1, 8 (1964).

[14]Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

[15]Robinson v. California, 370 U.S. 660 (1962).

[16]*E.g.*, Stein v. New York, 346 U.S. 156, 195-96 (1953).

[17]*E.g.*, Odom v. State, 205 Miss. 572, 37 So. 2d 300 (1948).

[18]See, *e.g.*, Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

[19]*E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

[20]5 WIGMORE, EVIDENCE § 1397, at 127 n.1 (3d ed. 1940, Supp. 1964) (add to list, ALASKA CONST. art. I, § 11).

[21]See, *e.g.*, Douglas v. Alabama, 85 Sup. Ct. 1074 (1965).

evidence rule,[22] which excludes extra-judicial testimonial assertions of fact because of the lack of a test of their truthfulness by cross-examination during trial.[23] To facilitate the admission of probative evidence, certain exceptions to the hearsay rule have been recognized as not violating the right of confrontation.[24] However, such exceptions have been limited to those which embody the principles of necessity for admission and a circumstantial assurance of trustworthiness.[25] Among the most frequently employed exceptions are: (1) prior testimony, in the form of depositions or transcripts, when the witness is unavailable,[26] the issue of the former testimony was substantially the same,[27] and an opportunity for adequate cross-examination existed at the prior hearing;[28] (2) dying declarations, of a homicide victim[29] who was conscious of impending death[30] and whose statement was not opinion[31] and is unimpeachable;[32] (3) spontaneous exclamations, when the declarant was a participant in or spectator of the startling event[33] and his statement was made in an excited state of mind[34] before time for reflection;[35] (4) reputation, if the witness can testify as to the accused's general reputation[36] in the community[37] prior to the alleged crime;[38] (5) statements of co-conspirators, provided they were made during and

[22] *E.g.*, Mattox v. United States, 156 U.S. 237, 243-44 (1895); Lambeth v. State, 23 Miss. 322, 357 (1852).

[23] See 5 WIGMORE, EVIDENCE § 1362, at 7 (3d ed. 1940).

[24] See, *e.g.*, Salinger v. United States, 272 U.S. 542 (1926).

[25] See 5 WIGMORE, EVIDENCE §§ 1420-23 (3d ed. 1940).

[26] *E.g.*, Coppedge v. United States, 311 F.2d 128 (D.C. Cir. 1962); Owens v. State, 63 Miss. 450 (1886).

[27] *Ibid.*

[28] *E.g.*, Fotie v. United States, 137 F.2d 831, 839 (8th Cir. 1943); Dukes v. State, 80 Miss. 353, 31 So. 744 (1902).

[29] *E.g.*, Shepard v. United States, 290 U.S. 96, 99 (1933); Lambeth v. State, 23 Miss. 322, 353-54 (1852).

[30] *E.g.*, Carver v. United States, 160 U.S. 553 (1896); Simmons v. State, 206 Miss. 535, 40 So. 2d 289 (1949).

[31] *E.g.*, Shepard v. United States, 62 F.2d 683, 685 (10th Cir. 1933), *rev'd on other grounds*, 290 U.S. 96 (1933); Powell v. State, 238 Miss. 283, 118 So. 2d 304 (1960).

[32] *E.g.*, Carver v. United States, 164 U.S. 694 (1897); Reeves v. State, 106 Miss. 885, 64 So. 836 (1914).

[33] *E.g.*, Wheeler v. United States, 211 F.2d 19 (D.C. Cir. 1953); Eubanks v. State, 242 Miss. 372, 135 So. 2d 183 (1961).

[34] *E.g.*, Guthrie v. United States, 207 F.2d 19 (D.C. Cir. 1953); Scaggs v. State, 16 Miss. (8 S. & M.) 722 (1847).

[35] *Ibid.*

[36] *E.g.*, Michelson v. United States, 335 U.S. 469, 477-78 (1948); Sinclair v. State, 87 Miss. 330, 39 So. 522 (1905). *Accord*, United States v. Sorkin, 275 F.2d 330 (2d Cir. 1960).

[37] *E.g.*, United States v. Pincourt, 159 F.2d 917 (3d Cir. 1947); Pickens v. State, 61 Miss. 563 (1884).

[38] *E.g.*, Shibley v. United States, 237 F.2d 327 (9th Cir. 1956); Wilkinson v. State, 143 Miss. 324, 108 So. 711 (1926).

in furtherance of the plan[39] and the conspiracy is proved even if not charged;[40] (6) statements against pecuniary, but not penal, interests;[41] and (7) official records, which were made under official authority[42] and within the personal knowledge of the recording official or his subordinates.[43] Therefore, the federal standard to be applied appears to be that the accused must be afforded an opportunity to actually confront and effectively cross-examine at trial all witnesses against him, unless he is provided with an adequae substitute for the right in the form of a recognized exception to the hearsay evidence rule.[44]

By insuring evidentiary uniformity in criminal trials, the decision in the instant case should require alteration of state rules of evidence to conform to the federal standard. On first impression, the decision would appear to have little effect on the Mississippi rules concerning the right of confrontation. However, it should be noted that insufficient confrontation in state criminal trials now raises a federal question. It is therefore to be expected that the Supreme Court will enunciate its standards more clearly in the future. While it can not be justly denied that the right of an accused to confront and cross-examine witnesses against him is a right fundamental to the administration of criminal justice, recent decisions indicate that the Supreme Court desires to obliterate the jurisdictional lines between federal and state application of criminal law, primarly for the sake of uniformity. It is submitted that this decision again reflects the Court's concern with protecting the accused and is another step in the continuing process of *total absorption.*

James W. O'Mara

Due Process—Power of State Courts To Assert Jurisdiction Over Foreign Corporation On The Basis of Commission of A Tort Within The State

Plaintiff, a Wisconsin corporation, bought an airplane from the defendant, a German corporation. Part of the consideration for the sale was plaintiff's promise that it would allow the defendant to borrow the plane to demonstrate it for prospective buyers. Defendant took the plane to Fort Rucker, Alabama, and while being flown by defendant's test pilot it crashed. Plaintiff, alleging negligence, brought suit in United States District Court in Alabama for damages to the plane. Defendant was not qualified to do business in Alabama, and had done no business except for the activity which gave rise to this suit. Service was had upon the defendant by serving the Secretary of

[39]*E.g.*, Krulewitch v. United States, 336 U.S. 440 (1949); Watson v. State, 166 Miss. 194, 146 So. 122 (1933).

[40]*E.g.*, United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945); Osborne v. State, 99 Miss. 410, 55 So. 52 (1911).

[41]Donnelly v. United States, 228 U.S. 243, 273 (1913); Brown v. State, 99 Miss. 719, 55 So. 961 (1911). *But see* Mason v. United States, 257 F.2d 359 (10th Cir. 1958).

[42]*E.g.*, White v. United States, 164 U.S. 100 (1896).

[43]Olender v. United States, 210 F.2d 795, 801 (9th Cir. 1954).

[44]See 5 Wigmore, Evidence § 1397 (3d ed. 1940).

State as provided by state law,[1] which permits such service in actions against a non-qualified, nonresident corporation accruing from any business or character of work done in the state. The trial court sustained defendant's motion to quash the return of service on the ground that its presence in Alabama for this one demonstration was not sufficient to subject it to the jurisdiction of the Alabama courts in a suit for an alleged tort arising out of the demonstration. From this ruling plaintiff appealed. HELD: Reversed and remanded. A state may assert jurisdiction over a nonresident, non-qualified corporation in a suit arising out of the commission of a tort in the state, even though only a single transaction is involved, and regardless of whether or not the activity is considered dangerous. *Elkhart Eng'r Corp. v. Werke,* 343 F.2d 861 (5th Cir. 1965).

Since the case of *Pennoyer v. Neff*,[2] it has been recognized that the due process clause of the fourteenth amendment places some limits on the power of the state courts to enter binding judgments against persons, including corporations, not served with process within their boundaries.[3] Prior to 1945 a state could not, except in special cases hereinafter discussed, obtain jurisdiction over a foreign corporation unless that corporation did business within the state.[4] If it was doing business it was held that it had impliedly consented to suit,[5] or that it was, by virtue of that business activity, present in the state and thus subject to suit.[6] The famous case of *International Shoe Co. v. Washington*[7] discarded the "implied consent" and "presence" theories, and held that due process required only that the foreign corporation have certain minimum contacts with the state such that the maintenance of the suit would not offend traditional notions of fair play and substantial justice. After several liberal decisions were handed down by the Court under the "minimum contacts" rule,[8] the Court warned that *International Shoe* did not remove all restrictions on the personal jurisdiction of the state courts, and held that a nonresident defendant could not be sued in a state in which he had not been served with process unless he had purposefully availed himself of the privilege of conducting activities in that state, thereby invoking the benefits and protection of its laws.[9] It would now seem that the state can obtain jurisdiction if the nonresident has purposefully done some act in the state, if the cause of action arose from or is connected with such act, and if the assumption of jurisdiction does not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the "basic equities" of the situa-

---

[1]ALA. CODE tit. 7, § 199(1) (1958).

[2]95 U.S. 714 (1877).

[3]Magee v. International Life Ins. Co., 355 U.S. 220, 222 (1957).

[4]See *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 919-22 (1960).

[5]*E.g.,* Old Wayne Life Ass'n v. McDonough, 204 U.S. 8, 21 (1907).

[6]*E.g.,* Philadelphia & Reading Ry. v. McKibbin, 243 U.S. 264 (1917).

[7]326 U.S. 310 (1945).

[8]See, *e.g.,* Magee v. International Life Ins. Co., 355 U.S. 220 (1957).

[9]Hanson v. Denckla, 357 U.S. 235, 253 (1958).

tion.[10] There is no requirement that a state court exercise the full reach of jurisdiction constitutionally available.[11] Since the *International Shoe* case, state courts, for the most part, have sought a middle ground in re-interpreting their old jurisdictional statutes in the light of the new rule, requiring less activity than before but still not extending them to the limits that the "minimum contacts" rule would allow.[12] Most courts have not interpreted statutes couched in the "doing business" language so as to permit their requirements to be satisfied by a single act.[13] However, some state legislatures have recognized the wisdom of passing new statutes which would increase the possibility of suit at home against a nonresident defendant.[14]

Before *International Shoe,* extensions of state court jurisdiction had been made in the form of "single act" statutes.[15] The first of these was a nonresident motorist statute, held constitutional in *Hess v. Pawloski,*[16] which allowed suit in the forum state if the nonresident had been involved in an automobile accident. This was considered to be a valid exercise of the state's power to regulate its highways, the dangerous nature of automobiles being emphasized.[17] Several states later passed statutes placing like liabilities on nonresidents who were involved in accidents while using watercraft or aircraft in the state.[18] It was soon apparent that activities which were not dangerous could also be the subjects of "single act" statutes if the state had a "special interest" in their regulation.[19] A number of states have passed statutes basing jurisdiction on the alleged commission of a single tortious act within the state, regardless of the nature of the activity from which the alleged tort arose.[20] In 1951 the Vermont "single tort" statute[21] was upheld in *Smyth v. Twin State Improvement Corp.*[22] This case was cited by a unanimous Supreme Court in *Magee v. International Life Ins. Co.*[23] It seems clear that the commission of a tort by a corporation within the forum state is a sufficient basis of jurisdiction for the state courts in suits arising out of that tort, even if the corporation has carried on only isolated activity within the state.[24]

---

[10]See Tyee Const. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245 (1963).

[11]Perkins v. Benquet Consol. Mining Co., 342 U.S. 437, 440 (1952).

[12]*Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 1000 (1960).

[13]*Id.* at 1002.

[14]Thode, *In Personam Jurisdiction,* 42 TEXAS L. REV. 279, 304 (1964).

[15]See *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 1002 (1960).

[16]274 U.S. 352 (1927).

[17]*Id.* at 356.

[18]*E.g.,* MISS. CODE ANN. § 8496-27 (Supp. 1964).

[19]See Reese & Galston, *Doing an Act or Causing Consequences as Bases of Judicial Jurisdiction,* 44 IOWA L. REV. 249, 258-60 (1959).

[20]*E.g.,* MISS. CODE ANN. § 1437 (Supp. 1964).

[21]VT. STAT. ANN. tit. 12, § 1562 (1959).

[22]116 Vt. 569, 80 A.2d 664 (1951).

[23]355 U.S. 220, 223 n.2 (1957).

[24]See *Developments in the Law—State-Court Jurisdiction,* 73 HARV. L. REV. 909, 926 (1960).

In 1940 the Mississippi legislature enacted a statute[25] which provided that the state courts could obtain jurisdiction over a nonresident if he did any business *or* performed any work or service within the state. However, the Mississippi Supreme Court on numerous occasions indicated that the statute required that a corporation "do business" in the state.[26] The requirements for "doing business" in Mississippi for purposes of jurisdiction are less strict than those for "doing business" for purposes of a foreign corporation qualifying to sue in the state courts.[27] Whether or not a corporation is "doing business" must be decided upon the facts of each case.[28] The important consideration is the quality and nature of the acts, and the test is essentially one of reasonableness.[29] In two of the most recent cases[30] the court quoted and applied the three-part test formulated by the Washington Supreme Court.[31] In *Mladinich v. Kohn*[32] the court implied that jurisdiction might be asserted in a cause of action arising out of the commission of a single, isolated tort within the state. On July 1, 1964, Section 1437 of the Mississippi Code was amended[33] to provide, in part, that a nonresident can be sued in Mississippi on any cause of action arising out of his commission of a tort, in whole or in part within the state, against a resident of Mississippi.

The decision in the instant case is in step with the movement, started by "single act" statutes and given great impetus by *International Shoe*, to lower the barriers of due process and allow the expansion of state court jurisdiction over nonresidents. It is submitted that this decision is in harmony with the "single act" and the "minimum contacts" rationales. The state has a "special interest" in providing its citizens with a practical and convenient means of seeking compensation for their injuries. "Traditional notions of fair play and substantial justice," the heart of the "minimum contacts" rule, are best served by the decision. It seems to be neither fair nor just to allow a nonresident to come into a state, cause injury to a resident's person or property, and then leave the state and force the injured party to either transport himself and his witnesses to a distant state or else abandon his right to redress.

Robert A. Weems

---

[25]Miss. Laws 1940, ch. 246.

[26]See, *e.g.*, Davis-Wood Lumber Co. v. Ladner, 210 Miss. 863, 50 So. 2d 615 (1951).

[27]*Ibid.*

[28]*Ibid.*

[29]Century Brick Corp. v. Carroll, 274 Miss. 514, 153 So. 2d 683 (1963).

[30]Republic-Transcon Indus., Inc. v. Templeton, 175 So. 2d 185, 189 (Miss. 1965); Mladinich v. Kohn, 164 So. 2d 785, 790 (Miss. 1964).

[31]Tyee Const. Co. v. Dulien Steel Prods., Inc., 62 Wash. 2d 106, 381 P.2d 245, 251 (1963).

[32]164 So. 2d 785, 790 (Miss. 1964).

[33]Miss. Code Ann. § 1437 (Supp. 1964).

EMINENT DOMAIN—SUBSTITUTE CONDEMNATION

For some time, Keller had used a pathway across Morgan's property to reach a public road. Construction of a limited access highway would destroy the pathway, thereby partially cutting off Keller's ingress and egress. The Mississippi State Highway Commission sought by substitute condemnation, the taking of an individual's land for another's use, to appropriate a strip across Morgan's land for the use of Keller, and to thereby fulfill a promise made to Keller while negotiating with him for the purchase of land to be used as right of way for the highway. Pursuant to section 2782 of the Mississippi Code, Morgan sued out a writ of prohibition to test whether there was a public necessity for the taking. The circuit court granted the writ and made it permanent. HELD: Reversed and remanded. Where a landowner's access is partially destroyed by construction of a highway, the highway department may by condemnation, acquire an easement for his use; substitute condemnation is permissible to acquire the easement under the necessarily wide measure of discretion needed to minimize damage to the landowner. *Mississippi State Highway Comm'n v. Morgan*, 175 So. 2d 606 (Miss. 1965).

"Eminent Domain is the power of the sovereign to take private property for public use without the owner's consent."[1] That compensation is an essential element of the valid exercise of this power has been incorporated into most state constitutions.[2] The compensation is almost invariably pecuniary and indeed a very early case[3] held that *only* monetary compensation was permissible. Nevertheless, when a person's property is taken through eminent domain, and the loss is extraordinary and difficult to assess, the condemnor may seek to justly compensate that person with something other than money.[4] The beneficiary is repaid with something substantially similar to what he had to give up, with the intention of reducing his loss more than would otherwise be economically feasible. However, this requires taking the "substitute" from a second condemnee. The question then arises as to whether this merely serves to compensate the person for whom it was taken, and so is for a private and consequently illegal use, or is rather a necessary incident of the taking for the use of the condemnor, and therefore a valid public use.[5]

Substitute condemnation may be plainly justifiable if for the benefit of a legal entity which is itself entitled to the power of condemnation. Such a case[6] was decided by the Supreme Court in 1930, where a state highway commissioner was allowed to take land for the use of a railroad which also had the capability to condemn. However, substitute condemnation is not so limited in scope. In the decision of *Brown v. United States*,[7] the Court, in allowing condemnation of private property for the relocation of an entire town whose original site was

---

[1] 1 NICHOLS, EMINENT DOMAIN § 1.11 (rev. 3d ed.1964).

[2] *E.g.*, MISS. CONST. art. 3, § 17.

[3] See Commonwealth v. Peters, 2 Mass. 125 (1806).

[4] 2 NICHOLS, EMINENT DOMAIN § 7.226 (rev. 3d ed. 1963).

[5] See Pearl River Valley Water Supply Dist. v. Brown, 248 Miss. 4, 18-19, 156 So. 2d 572, 577 (1963).

[6] Dohany v. Rogers, 281 U.S. 362 (1930).

[7] 263 U.S. 78 (1923).

inundated by a reservoir, held that: (1) it would be very difficult to place a monetary valuation on such things as streets if not replaced in kind;[8] and (2) the acquisition of the new townsite was so necessary to carrying out the overall project that the taking was justified.[9] In 1958 a Massachusetts court[10] went further by holding that where plots of land were deprived of all access by construction of a turnpike, the Turnpike Authority had eminent domain power to appropriate easements to enable all parties to gain access to other roads. The reasoning employed in *Luke* was similar to that in *Brown*, but *Luke* held that the rule denying the power to take property for private uses does not apply where the property is to be disposed of for a private purpose, but *in furtherance of* a public use. In Mississippi the legislature delegates, by statute, power to employ eminent domain, and the agency so empowered may acquire only such quantity of land and estate in it as is authorized by the statute.[11] Moreover, when a creature of the legislature, such as the State Highway Commission, is seeking to condemn land, the petition of eminent domain should be construed favorably to the landowner and strictly against the condemnor.[12] On the other hand, the court will interfere with the condemnor's actions only when fraud or abuse of discretion is shown.[13] *Culley v. Pearl River Industrial Comm'n*,[14] applied a broad interpretation to public use by declaring that eminent domain exercised for a primarily public purpose will not be defeated by an incidentally resulting private use. In the instant case the majority thought the commission had not abused its discretion and that the acquisition of Keller's easement was an essential by-product of accomplishing the main purpose.

The decision in this case is the first application of substitute condemnation in Mississippi. The principle may require interpretation at least occasionally, however, since the limited access highway system as it expands will almost certainly deprive more property of accessibility; and Mississippi has no law to permit a person whose access is cut off to sue for an easement. Since substitute condemnation is generally accepted as a legitimate method of taking property, the question is whether it was appropriately applied under the particular circumstances. Justice Patterson, dissenting in the principle case, was of the opinion that the commission abused its discretion by taking "purely and simply" for a private use.[15] It is submitted that a rule enabling one whose access is entirely destroyed to acquire another may be desirable, but Keller's property joined another public road, so another means of access was available to him. It is believed that this decision does not mean that a substitute easement can always be provided by con-

---

[8]*Id.* at 82.

[9]*Id.* at 81.

[10]Luke v. Massachusetts Turnpike Authority, 337 Mass. 304, 149 N.E.2d 225 (1958).

[11]See Gale v. City of Jackson, 238 Miss. 826, 120 So. 2d 550 (1960).

[12]*Id.* at 834, 120 So. 2d at 553.

[13]*E.g.*, Horne v. Pearl River Valley Water Supply Dist., 249 Miss. 358, 162 So. 2d 504 (1964).

[14]234 Miss. 788, 816, 108 So. 2d 390, 400 (1959).

[15]Mississippi State Highway Comm'n v. Morgan, 175 So. 2d 606, 613 (Miss. 1965) (Patterson, J., dissenting).

demnation when a single means of access is ruined, but another is available. Although access rights are valuable and should be replaced where the circumstances are suitable, to do so in every case would sacrifice the rights of the condemnee unnecessarily.

Wade H. Creekmore, Jr.

Evidence—Prosecuting Witness Must Orally State Obscene Language Used by Defendant

The defendant was arrested for a violation of the Mississippi statute[1] prohibiting the use of obscene and indecent language over the telephone. During the trial, the prosecuting witness, a female, was permitted to write the indecent words upon a piece of paper instead of stating the words orally. The piece of paper was given to counsel for the defendant and then handed to the court. The court allowed the paper to be shown to the jury in lieu of oral testimony. Defendant's counsel cross-examined the witness, but did not require her to repeat the obscene words. Defendant was found guilty and appealed, citing as error the fact that the prosecuting witness did not speak the obscene words. Held: Reversed and remanded. In a prosecution for the use of obscene language, the prosecuting witnesses must orally state the obscene language in court. *Spears v. State*, 175 So. 2d 158 (Miss. 1965).

The right to confrontation is guaranteed by the sixth amendment to the United States Constitution and is found in practically every state constitution.[2] It is generally agreed that the requirement of confrontation has two purposes.[3] The main and essential purpose is to secure for the accused the opportunity of cross-examination, but a secondary advantage is obtained by the personal appearance of the witness because the judge and the jury are enabled to observe the witness' demeanor while testifying.[4] In determining whether witnesses are to be believed, the jury may consider their reactions, manner of expression, and apparent candor or want of it in answering questions on both direct and cross-examination.[5] The demeanor of a witness may always be considered in the estimation of his credibility and is always assumed to be in evidence.[6] Even the beginning lawyer is familiar with such fundamental discretionary powers of the jury as the right to indict or not to indict, to convict or to acquit, to believe a witness or not to believe him; however, the discretionary powers of the trial court do not rest entirely with juries.[7] The frequent exercise of sound judicial discretion by trial judges in the manner of examining witnesses is one of the utmost importance.[8] This importance was expressed in *Jackson*

[1] Miss. Code Ann. § 2291.5 (Supp. 1964).

[2] *E.g.*, Miss. Const. art. 3, § 26.

[3] 5 Wigmore, Evidence § 1395, at 123 (3d ed. 1940).

[4] *Id.* § 1395, at 123-26.

[5] *E.g.*, Gittens v. Lundberg, 3 Utah 2d 392, 284 P.2d 1115 (1955).

[6] *E.g.*, Panarella v. Panarella, 134 N.Y.S.2d 440 (Sup. Ct. 1954).

[7] Coleman, *The Exercise of Judicial Discretion in Criminal Prosecutions in the Circuit Courts of Mississippi*, 11 Miss. L.J. 152 (1938).

[8] Testimony in writing or by the use of an interpreter has quite generally been allowed where the accused is deaf, mute, or does not understand the English language. 24 Mich. L. Rev. 305 (1926).

Yellow Cab Co. v. Alexander,[9] where it was said that the state and federal courts of this country have universally recognized that the trial judge has wide discretion in conducting the examination of witnesses.[10] The object of examining the witness is to elicit the truth,[11] and judicial discretion in this area must generally appear to have been flagrantly abused before a verdict will be reversed on such ground.[12] It is not only the right but the duty of the trial judge to do what he can to relieve the witness from fear or nervousness so that the truth may be given in evidence.[13]

There are no known cases requiring a reversal for the alleged error of allowing a witness to introduce obscene words in writing.[14] In upholding the right of a trial judge to allow indecent words to be entered in this manner, the Alabama Supreme Court said:

> Every court has the power to preserve the common decencies of life. In the exercise of this power, the constitutional rights of parties and witnesses duly observed, the courts exercise a large discretion in respect to the mode of examining witnesses. They may permit a female witness to answer questions shocking to modesty—and such questions are sometimes necessary—in the way least offensive to a proper sense of decency. . . . [T]here is no evidence that the defendant's right of cross-examination was in any way limited, nor that in any other respect defendant was injured by that ruling of the court which permitted the plaintiff to answer in writing the question. . . .[15]

In the California case of *People v. White*,[16] it was held that the defendant waived any objection to this method of introducing the obscene language by accepting the testimony in writing without insisting upon an oral response. The vast majority of decisions in the United States support the rule that the right to confrontation may be waived by the defendant.[17] The dissent in the principal case followed the general rule in holding that counsel for the defendant waived any objection to this method of introducing the evidence because he told the prosecuting witness not to repeat the obscene words during the cross-examination.[18] However, the majority opinion in the instant case stated that this was not a waiver of the defendant's right because requesting the witness to speak the obscene words would have produced nothing more than a hostile reaction on the part of the jury.[19]

A reading of the principal case will disclose that the court has set

---

[9]246 Miss. 268, 148 So. 2d 674 (1963).

[10]*Accord*, Darby v. United States, 283 F.2d 896 (10th Cir. 1960); Benham Constr. Co. v. Rentz, 69 Wyo. 176, 238 P.2d 927, 933 (1951).

[11]*E.g.*, Daudt v. Steiert, 205 S.W. 222 (Mo. 1918).

[12]*E.g.*, Darby v. United States, 283 F.2d 896 (10th Cir. 1960).

[13]*E.g.*, State v. Romero, 34 N.M. 494, 285 Pac. 497 (1930).

[14]Spears v. State, 175 So. 2d 158, 169 (Miss. 1965) (Gillespie, J., dissenting).

[15]Johnson v. Johnson, 201 Ala. 41, 77 So. 335, 338 (1917).

[16]5 Cal. App. 329, 90 Pac. 471 (1907).

[17]See 23 So. CAL. L. REV. 266 (1950).

[18]Spears v. State, 175 So. 2d 158, 169 (Miss. 1965) (Gillespie, J., dissenting).

[19]*Id.* at 164.

forth an arbitrary rule which does not allow the trial judge to exercise judicial discretion. The basis for this rule, as given by the court, is the defendant's right to confront the witness and have her demeanor observed. However, the general rule is that if there has been a cross-examination, there has been a confrontation, and the satisfaction of the right of cross-examination disposes of any objection based on the so-called right of confrontation.[20] The discretion exercised by the courts with regard to the mode of examining witnesses is a power which safeguards the decencies of the community,[21] and when the constitutional rights of parties and witnesses are not infringed, the trial court should be allowed a wide range of discretion. The dissenting justice in the principal case asserts that the courts of any community should have the right to exercise sound judicial discretion in determining if a witness should be embarrassed by speaking obscene words.[22] It was also pointed out in the dissent to the instant case that if witnesses are required by the court to utter obscene words from the witness stand, they will refuse to subject themselves to such embarrassment, and the administration of the laws will suffer.[23] It is therefore submitted that the mode of testifying in such circumstances as those posed by the principal case should be governed by the discretion of the trial judge.

Guthrie T. Abbott

Municipal Law—Registration of Voters Effective on Date of First Proper Application—Annexation by Municipal Corporations May Not be Deferred

The city of Pascagoula, Mississippi, passed an ordinance in October 1963 enlarging its city limits. After adoption of the ordinance a petition was filed in the Chancery Court of Jackson County asking that the ordinance be ratified and approved. Several residents of the annexed area objected to the annexation. In December 1963, the chancery court entered its final decree ratifying the ordinance as being reasonable and necessary, but deferring the effective date of annexation until July 1, 1965. This deferment was in accord with an agreement between the city and the objectors whereby certain services, fire and police protection, were to be furnished immediately without the normal assessment of city taxes. One of the residents of the annexed area applied to the city registrar for registration as a legal voter in the city. On denial of registration an appeal was perfected to the Board of Election Commissioners which ordered the registration. Upon appeal by the registrar, the circuit court reversed the decision of the Board. Held: Reversed. Any person wrongfully denied the right to register as a voter who successfully appeals shall be registered as of the date such person first made proper application; furthermore, a chancellor ruling on an annexation proposal for ratification or rejection may not

---

[20]See 5 Wigmore, Evidence § 1396 (3d ed. 1940).

[21]Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917).

[22]Spears v. State, 175 So. 2d 158, 168 (Miss. 1965) (Gillespie, J., dissenting).

[23]*Id.* at 168-69.

defer the effective date of such annexation. *Lippian v. Ros,* 175 So. 2d 138 (Miss. 1965).

The election process, defined as the embodiment of the popular will, or the expression of the sovereign power of the people,[1] is the foundation of a free society. The right to vote is not a privilege nor an inherent or natural right; it is a political or civil right under the control of the state.[2] States in general have the broad power through state constitutions and state laws to determine the conditions under which the elective franchise may be exercised,[3] including the requirements for registration.[4] Basically, registration is a method of proof, prescribed for ascertaining the electors who are qualified to cast votes.[5] The states have further power to provide by legislation for the annexation of additional territory by municipalities,[6] such annexation to be accomplished for the public good.[7] Municipal corporations are generally given the power to extend their own corporate limits.[8] In Mississippi, this annexation process is finally reviewed by the chancellor who is given certain specific powers.[9] These provisions are all statutory, having no counterpart in the common law; therefore, the judiciary will interpret them closely and demand a strict compliance, by courts as well as municipal authorities.

The Mississippi Constitution provides that all voters must be properly registered[10] and that all who are registered shall be entitled to vote.[11] However, neither the constitution nor the applicable statutes designate the effective date of registration for one having to appeal from a denied application. It has been held that a voter whose name was erroneously removed from the rolls had only the remedy of re-registration.[12] This could be applied to original applicants denied but later accepted. The present case,[13] which is one of first impression in Mississippi, specifically concludes that effective registration is retroactive to the date of first proper application, after a successful appeal. Construing one section of the Mississippi Code,[14] which pertains primarily to circuit courts, to apply to the supreme court, the ruling in the present case may be questionable, for the statute provides that on successful appeal the petitioner should be *forthwith* registered. However, forthwith may be interpreted as the mechanical registration and not its

---

[1]Commonwealth v. Likely, 267 Pa. 310, 110 Atl. 167 (1920).

[2]*E.g.,* Davis v. Teague, 220 Ala. 309, 125 So. 51 (1929).

[3]*E.g.,* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 50 (1959).

[4]*E.g.,* Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221 (1949).

[5]Board of Registration Comm'rs v. Campbell, 251 Ky. 597, 65 S.W.2d 713 (1933).

[6]*E.g.,* MISS. CODE ANN. § 3374-10 (1956).

[7]See Norfolk County v. City of Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947).

[8]*E.g.,* City of Sebring v. Harder Hall, Inc., 150 Fla. 824, 9 So.2d 350 (1942).

[9]MISS. CODE ANN. § 3374-13 (1956).

[10]MISS. CONST. art. 12 § 249.

[11]MISS. CONST. art. 12, § 241.

[12]Calvert v. Crosby, 163 Miss. 177, 139 So. 608 (1932).

[13]Lippian v. Ros, 175 So. 2d 138 (Miss. 1965).

[14]MISS. CODE ANN. § 3230 (1956).

effective date. The deferment of annexation, too, is one of first impression in Mississippi, with only one other authority on all fours found in any jurisdiction, holding that the lower court could approve or deny annexation, but could not suspend it for a period of time.[15] Certain decisions have allowed suspension of annexation when an amendment to a city charter was involved,[16] and others have allowed suspension during appeal time from the first hearing.[17] The Mississippi Code provides for annexation proceedings to be ratified by the chancery court with powers to ratify in toto, deny, or modify by reducing the size of the territory,[18] and these same restrictive powers have been re-affirmed by two Mississippi cases.[19] A literal interpretation of these enumerated powers caused the court in the present case to deny the chancellor the authority to extend these powers in annexation proceedings.[20] Further, as held in a prior decision,[21] the improper portion of the decree on deferment will be regarded as surplusage, leaving the original ratification intact.

The court's decision on retroactive voter registration and its refusal to allow annexation suspension or deferment are reasonable and logical, but two basic problems remain to be solved. These particular problems are: (1) the effect of retroactive registration on elections held between first application and final appellate action; and, (2) the liability of residents of the annexed area for city taxes during the attempted period of deferment. The legislature must provide for registration of voters to regulate the right of suffrage[22] (though not to restrict the right to vote), and one may speculate as to whether the courts can properly set the effective date. With registration laws properly enacted and judicially interpreted, some authorities hold that elections conducted without regard to these laws would be a nullity.[23] There are conflicting views on what would nullify an election. A good faith exclusion of voters in some instances will not invalidate an election, because public policy is best served by allowing the election to stand, since it would be impossible to determine what effect the disallowed voters would have had.[24] This is substantiated by decisions that a voter denied the right to exercise his privilege cannot be heard to say for whom he would have voted.[25] Further rulings declare that regulatory laws stipulate the qualifications for voting, and that persons not possessing these qualifications at the time of the election, regardless of cause, may not exercise the elective privilege.[26] Other decisions appear to apply

[15]State v. Town of Hessville, 191 Ind. 251, 131 N.E. 46 (1921).

[16]Barnes v. Kansas City, 359 Mo. 519, 222 S.W.2d 756 (1949).

[17]See County of Fairfax v. Town of Fairfax, 201 Va. 362, 111 S.E.2d 428 (1959).

[18]Miss. Code Ann. § 3374-13 (1956).

[19]Smith v. City of Meridian, 237 Miss. 486, 495, 115 So. 2d 323, 327 (1959); Ritchie v. City of Brookhaven, 217 Miss. 860, 873, 65 So. 2d 436, 440 (1953).

[20]Lippian v. Ros, 175 So. 2d 138 (Miss. 1965).

[21]Village of Averyville v. City of Peoria, 335 Ill. 106, 166 N.E. 488 (1929).

[22]See, *e.g.*, Franklin v. Harper, 205 Ga. 779, 55 S.E.2d 221 (1949).

[23]See, *e.g.*, Langlois v. Lancaster, 217 La. 995, 47 So. 2d 795 (1950).

[24]State v. Hanson, 87 Wis. 177, 58 N.W. 237 (1894).

[25]Martin v. McGarr, 27 Okla. 653, 117 Pac. 323 (1910).

[26]See, *e.g.*, Molero v. Rowley, 194 La. 527, 194 So. 7 (1940).

more to the situation at hand, as where it was held that rejection of voters sufficient in number to change the election results would cause the election to be void.[27] Usually, until a voter either qualifies by showing his right to vote or offers to do so, he is not a rejected voter.[28] But, in some jurisdictions, when notice is given to certain persons that they cannot vote (as was the situation in the present case), they are not required to make a vain effort in order to assure judicial protection.[29] Also, denial of the elective privilege to a class, for example, residents of a particular area, will invalidate the election,[30] especially where the class is large enough to materially affect the election results. Logically, the inhabitants of a large area could alter most election results. In concluding that the annexation became effective on final decree of the chancery court and that residents should be allowed to register as electors, a further conclusion could be drawn that these same residents would be liable for city taxes. City authorities are not allowed to absolve residents of annexed areas from taxes in other jurisdictions, such attempts being ultra vires.[31] Also, since an unincorporated area may be annexed by a city without the consent of, and even against the remonstrance of the majority of the residents of the annexed area,[32] the wishes and desires of those residents would appear to be of no consequence. Further, these persons not only may be annexed and taxed against their will, but they may be assessed for taxes to pay on bonds voted in elections held prior to the annexation—elections in which these persons could not vote.[33]

It appears that elections held in Pascagoula between December 1963 and July 1965 could be invalidated and that residents of the annexed area could be liable for taxes for that period of time. Though mainly of local importance, the *Lippian* case has vast implications on Mississippi election laws, and in view of the present civil rights activity and federal voter laws, could lead to extensive litigation in this area. Therefore, it is submitted that even as dictum, statements by the court on these problems would be helpful in the future.

Roy C. Williams

Oil and Gas Lease—Delay Rental Payment by Stranger to Lease

The defendant lessee obtained an oil and gas lease on his lessor's undivided one-sixteenth interest in a tract of land. The lease form expressly provided that the lessee would tender delay rentals, the periodic payments made in lieu of drilling, to the lessor or to a local bank designated as the lessor's agent and depository for the rental

---

[27]See, *e.g.*, Crow v. Bryan, 215 Ga. 661, 113 S.E.2d 104 (1960).

[28]Erwin v. Benton, 120 Ky. 536, 87 S.W. 291, 294 (1905).

[29]Crow v. Bryan, 215 Ga. 661, 113 S.E.2d 104 (1960).

[30]*E.g.*, Coggeshall v. City of Des Moines, 138 Iowa 730, 117 N.W. 309 (1908).

[31]Thale v. Cincinnati, 1 Ohio N.P. 427 (1895). (Hamilton County Court of Common Pleas).

[32]*E.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907).

[33]See, *e.g.*, Barnes v. Kansas City, 359 Mo. 519, 222 S.W.2d 756 (1949).

sums. The lessor accepted three annual rental checks, without actually knowing who made the payments, since the checks to him were those of the bank. On the due date of the fourth rental payment, the bank advised the lessor that a check had been deposited by a person other than the lessee, and that the bank could make payment on it only if the lessor would guarantee the check by his endorsement. The lessor refused to guarantee the check; it was forwarded for collection through normal channels and eventually was honored, but the lessor then refused to accept payment, contending that the tender was made too late, by a stranger to the lease. The lessor brought suit to cancel the lease, alleging that the lesee's failure either to drill or to make timely delay rental payments caused the lease to terminate. From a decree of cancellation, the defendant lessee appealed. HELD: Affirmed. Where an "unless" type oil and gas lease provides that delay rental payments are to be made by the lessee, tender of rental sums on the due date by a stranger to the lease does not satisfy the lease requirement of payment, and the lease terminates. *Wagner v. Mounger*, 175 So. 2d 145 (Miss. 1965).

Since the beginning of the American petroleum industry in 1859, the oil and gas lease has undergone a continuing process of evolution.[1] The earliest oil and gas leases contained a "drill or forfeit" clause, whereby the lessee covenanted to develop the demised premises within a certain time; upon his failure to drill within the period specified, the lessor could sue for forfeiture of the lease.[2] While a "drill or forfeit" clause is still encountered in a few leases,[3] its harsh penalty of forfeiture has caused the modern lessee to insert the delay rental clause as a means of self protection.[4] Under the earliest delay rental clauses, which appeared in the so-called "or" form leases, the lessee expressly promised either to drill *or* to advance periodic rental payments to his lessor in order to secure the right not to drill within the time covered by the payment.[5] The lessee's promise amounted to a covenant continuing for the whole term of the "or" lease, for the breach of which the lessor could sue to cancel the lease and to collect the rental payments.[6] Even if the lessee decided that the lease agreement was an unprofitable venture, he remained bound by his covenant to pay rentals.[7] Late in the last century a provision was made for the lessee to escape this burdensome covenant, by drafting of the modern "unless" lease form, which gives the lessee the right to drill, to pay, or to do nothing with impunity.[8] As opposed to the "or" lease, by which the lessee

[1]See generally Moses, *The Evolution and Development of the Oil and Gas Lease*, SOUTHWESTERN LEGAL FOUNDATION, 2D INST. ON OIL AND GAS LAW AND TAXATION 1 (1951).

[2]*E.g.*, Shannon v. Long, 180 Ala. 128, 60 So. 273 (1912).

[3]*E.g.*, Muth v. Aetna Oil Co., 188 F.2d 844 (7th Cir. 1951).

[4]See Strayhan, *Express Provisions of the Modern Oil and Gas Lease in Mississippi*, 28 MISS. L.J. 109, 134 (1957).

[5]See 2 SUMMERS, OIL AND GAS § 334 at 370 (perm. ed. rev. 1959).

[6]*E.g.*, Galey v. Kellerman, 123 Pa. 491, 16 Atl. 474 (1889). *Contra*, Chism v. Hollis, 152 Miss. 772, 118 So. 713 (1928).

[7]See 2 SUMMERS, OIL AND GAS § 337 at 385-86 (perm. ed. rev. 1927).

[8]*E.g.*, Glasgow v. Chartiers Oil Co., 152 Pa. 48, 25 Atl. 232 (1892); White v. Hunt, 193 Miss. 742, 10 So. 2d 539 (1942).

expressly promises either to drill or to pay, the words of the typical "unless" lease state a limitation, upon the happening of which the lease terminates; the limitation is that if the lessee does not drill during the lease term, the lease becomes automatically void *unless* he pays delay rentals.[9] To prevent the lease from terminating, the lessee must ordinarily make the delay rental payment in advance, on or before the first day of the rental period during which drilling is to be deferred.[10]

Courts frequently encounter cases involving the proper manner of making delay rental payments under an oil and gas lease. Such cases include a determination of: (1) the correct time[11] and place[12] of payment; (2) the proper medium of payment, whether by check[13] or cash;[14] and (3) the proper person to whom[15] and by whom[16] the rentals are payable. Where the lease designates a bank as the depository for delay rental sums, the courts have universally held that if the lessee delivers the rental sum to the bank on or before the due date, and the bank places the amount to the credit of the lessor, the lessee's act of tender satisfies the lease requirement of payment.[17] Regarding the question of payment of rentals by a person other than the lessee, the Mississippi Supreme Court in the case of *White v. Hunt*[18] held that a timely overpayment by one of the lessee's partial assignees did not renew the lease as to other partial assignees who did not pay their share of the rentals on the due date. While that decision did not involve the novel question found in the present case—whether tender of rentals by a stranger to an oil and gas lease constitutes a proper mode of payment in accordance with the terms of the lease—the court in the *White* case indicated that such tender would not suffice to renew the lease.[19] A recent Mississippi decision, *Frost v. Gulf Oil Corp.*,[20] held that the rules of construction used to interpret a mineral lease are the same as those used on other written instruments and announced that the Mississippi court will construe oil and gas leases strictly against the lessee and in favor of the lessor. The court in the present case, basing its decision on *Frost*, employed the familiar rule of construction that if the words of an instrument unambiguously express the intent of the parties, a court will not, by unnecessary construction, alter the terms of the instrument. It was but a short step for the court to hold that a lease stipulating that the lessee tender rental payments meant that tender by any other person would not suffice.

While the lease encountered in the present case clearly and

---

[9]*E.g.*, White v. Hunt, 193 Miss. 742, 754, 10 So. 2d 539, 540 (1942).

[10]*E.g.*, Hughes v. Franklin, 201 Miss. 215, 29 So. 2d 79 (1947).

[11]*Ibid.*

[12]*E.g.*, Warmack v. Zingg, 179 Ark. 391, 16 S.W.2d 17 (1929).

[13]*E.g.*, Philadelphia Co. v. Renner, 222 Pa. 512, 71 Atl. 1056 (1909).

[14]*E.g.*, Gaunt v. Alabama Bound Oil & Gas Co., 281 Fed. 653 (8th Cir. 1922).

[15]*E.g.*, Ocala Oil Co. v. Hughes, 187 Ky. 486, 219 S.W. 799 (1920).

[16]See, *e.g.*, Carrothers v. Stanolind Oil & Gas Co., 134 F. Supp. 191 (N.D. Tex. 1955).

[17]*E.g.*, Beatty Oil & Gas Co. v. Blanton, 245 Fed. 979 (E.D. Ky. 1917).

[18]193 Miss. 742, 10 So. 2d 539 (1942).

[19]*Id.* at 755, 10 So. 2d at 540.

[20]238 Miss. 775, 786, 119 So. 2d 759, 761 (1960).

unambiguously provided that delay rentals would be paid by the lessee, the cancellation of the lease occasioned by the lessee's failure to meet the rigid construction placed on the instrument would seem to be an unduly harsh result. Under the facts of the instant case, the only apparent way for a lessee to protect his lease from cancellation would be by personally tendering delay rentals to the lessor or to a depository bank named in the lease. It could be inferred from the present case that a lessee desiring allowance for a more convenient mode of payment might have to insert a new lease clause providing for effective payment by persons other than himself. It is submitted, however, that no certain conclusion may be inferred from the court's decision; only by future decisions relating to delay rental payment will the lessee be advised of the extent of his obligations. Modern oil and gas law should keep abreast of contemporary commercial customs; it is believed that the growth of the oil and gas industry can be better complemented by a less rigid, more flexible adjustment of the rights of a lessor with the rights of his lessee.

Len Blackwell

Tort Liability—Municipal Liability for Intentional Tort Committed by Police Officer

The plaintiff brought suit against the City of Miami and two of its police officers for intentional torts alleged to have been committed upon him by the officers acting within the scope of their authority. A summary judgment entered in the city's favor was reversed by the district court, and the city appealed. Held: Affirmed. A municipality is liable for intentional torts committed by its employees acting within the scope of their authority. *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965).

The general view regarding municipal tort liability is that a city has two classes of powers: one in which it governs its people, and the other which is performed for the private advantage of the inhabitants of the city, and of the city itself as a legal personality.[1] In the exercise of governmental powers, the city is clothed with sovereignty and there is no tort liability; but in the exercise of private, or proprietary, as it is frequently termed, powers the doctrine of *respondeat superior* applies, and the municipality will be liable for torts committed by its employees in the performance of these duties.[2] The great weight of authority holds that the police regulations of a city are made in the interest of the public, and not in the interest of the city in its corporate capacity.[3] Therefore, a city is not liable for the acts of its police officers in attempting to enforce such regulations.[4] The rule of immunity in the exercise of governmental functions, having its inception in the English

[1]See 2 Antieau, Municipal Corporation Law § 11.07(1) (1965).

[2]*E.g.*, City of Gulfport v. Shepperd, 116 Miss. 439, 77 So. 193 (1918).

[3]*E.g.*, Kelly v. Council of Wilmington, 35 Del. (W.W. Harr.) 9, 156 Atl. 867 (Super. Ct. 1931).

[4]See 4 Dillon, Municipal Corporations § 1656 (5th ed. 1911).

case of *Russell v. Men of Devon*,[5] has been traditionally based on the theory that "the king can do no wrong."[6] Many different reasons were advanced by the courts of this country as they began to accept the doctrine of municipal immunity for police torts.[7] The appointment of a policeman was said to be merely "a convenient mode of exercising a function of government."[8] Policemen were held to be "public servants of the state,"[9] not agents of the city. That a city is not liable for torts committed by a policeman was said to be "well-settled,"[10] and that to hold otherwise would create "unlimited possibilities of the wasteful and dishonest dissipation of public funds."[11] Prior to 1957, there had been several cases holding municipal corporations liable for torts of police officers, but most of these decisions involved *negligent* torts committed by an officer performing a *proprietary* function.[12] In the 1957 case of *Hargrove v. Town of Cocoa Beach*,[13] Florida became the first state to explicitly eliminate the governmental-proprietary distinction when the court held that a municipality would be liable for any *negligent* tort committed by a police officer acting within the scope of his authority. Following the *Hargrove* decision, several states removed the municipal immunity barrier, but a large majority of the courts continued to uphold the established rule of non-liability.[14] In a decision[15] discussing the *Hargrove* case at length, the Supreme Court of Wyoming used one of the most effective arguments against municipal liability for torts committed by police officers, when it stated that the abrogation of this doctrine should be performed by the legislature and that it was not subject to judicial repudiation. New York has not expressly eliminated the governmental-proprietary distinction, but it is now well settled in that state that a municipality may be liable for the *negligence* of an officer or employee in the performance of a governmental function.[16] Michigan also adopted the rule that actions against municipalities may be maintained on the basis of the tortious acts of its police officers.[17] It is possible for a city to waive its governmental immunity from tort liability up to the amount of a policy of liability insurance in favor of the city.[18]

In a 1936 decision,[19] the Supreme Court of Mississippi held that a

---

[5]2 Term Rep. 667, 100 Eng. Rep. 359 (K. B. 1788).

[6]See, *e.g.*, Evans v. Berry, 262 N.Y. 61, 186 N.E. 203 (1933).

[7]See generally Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475, 478-84 (1963).

[8]City of Lawton v. Harkins, 340 Okla. 545, 126 Pac. 727, 728 (1912).

[9]Peters v. City of Lindsborg, 40 Kan. 654, 20 Pac. 490, 491 (1889).

[10]Gullikson v. McDonald, 62 Minn. 278, 64 N.W. 812 (1895).

[11]Hinds v. City of Hannibal, 212 S.W.2d 401, 402 (Mo. 1948).

[12]See 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 11.11, at 46-47 (1965).

[13]96 So. 2d 130 (Fla. 1957).

[14]See Shapo, *Municipal Liability for Police Torts: An Analysis of a Strand of American Legal History*, 17 U. MIAMI L. REV. 475, 498-510 (1963).

[15]Maffei v. Town of Kemmerer, 80 Wyo. 33, 338 P.2d 808 (1959).

[16]Collins v. City of New York, 171 N.Y.S.2d 710 (Sup. Ct. 1958).

[17]Sherbutte v. Marine City, 374 Mich. 93, 130 N.W.2d 920 (1964).

[18]*E.g.*, Nishan v. Godsey, 166 F. Supp. 6 (E.D. Tenn. 1958). *Contra, e.g.*, McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959).

[19]City of Meridian v. Beeman, 175 Miss. 527, 166 So. 757 (1936).

city was liable for injuries to a bicyclist resulting from a policeman's negligent operation of an automobile while patrolling his beat. The court stated that the policeman was charged with corporate duties, as well as governmental duties, because he was required by ordinance to note and report conditions of bridges, culverts, sewers, and streets, while patrolling his beat, and that as a result of these corporate duties, the city was liable. This decision could have been interpreted as indicating that Mississippi was moving toward the ultimate conclusion reached by the Florida court, that a city would be liable for *all* torts committed by a police officer acting within the scope of his authority. However, in 1961, the Mississippi Supreme Court held[20] that a municipality was not liable for an assault and battery committed by a police officer while engaged in enforcing the laws of the municipality, even though the appointing authorities knew at the time of his appointment that the officer had earlier been convicted of murder, and had retained the officer after he had committed several other assaults. The decision indicates that Mississippi is presently a strong supporter of the governmental immunity doctrine. The Mississippi court has not stated whether the nature of the tort would be influential in determining liability of the city, but this problem has been the principal subject of several cases in Florida.[21] The district courts of Florida were reluctant to hold that the *Hargrove* decision would make cities liable for intentional torts committed by police officers.[22] These courts feared that an adoption of the doctrine of municipal liability for intentional torts would bring "incalculable mischief to the public welfare."[23]

The eyes of the legal profession will be focused on the decisions by the Florida courts as they face the practical problems involved in the removal of the governmental immunity doctrine. The effectiveness of this new rule in Florida will be a very important factor in determining the future of municipal tort liability in other states. The judiciary of the states which have abrogated the governmental immunity doctrine will be confronted with many new problems, but their diffiiculties will be minor in comparison with those encountered by city management as the cities are divested of their tort immunity. The Supreme Court of Florida has taken an admirable stand in holding that a municipal corporation will be liable for an intentional tort committed by a city employee. The ultimate result should be that the municipalities within this jurisdiction will use the utmost care in the selection of their police officers, and if injury does occur the liability will be distributed throughout the entire community instead of being placed on an individual. It is difficult to appreciate the rule in Mississippi which allows no recovery from a city for assault and battery committed by a police officer who had been convicted of murder and who had committed several previous assaults.[24] It seems logical that municipal liability for a tort of this nature would be effective in preventing cities from employing a man with a questionable background as a police officer.

[20]Anderson v. Vanderslice, 240 Miss. 55, 126 So. 2d 522 (1961).

[21]*E.g.*, Middleton v. City of Ft. Walton Beach, 113 So. 2d 431 (Fla. App. 1959).

[22]*E.g., ibid.*

[23]*Id.* at 432.

[24]Anderson v. Vanderslice, 240 Miss. 55, 126 So. 2d 522 (1961).

There will probably be a large increase in actions against cities in the state of Florida for intentional torts committed by police officers. The primary reason for this anticipated increase is the fact that police officers are especially susceptible to intentional torts such as malicious prosecution, assault and battery, and false imprisonment. Police officers will be required to be extremely cautious at all times, because the addition of a city as a defendant will more than likely create a greater possibility of obtaining a large verdict, and, therefore, their wrongful actions will be more apt to result in a lawsuit. The abolition of governmental immunity from liability for intentional torts committed by police officers will bring many problems to our public officials, but this will be a small price to pay for the removal of this ancient doctrine.

E. Clifton Hodge, Jr.

Unemployment Compensation—Disqualification for Benefits Due to Lack of Transportation to Work

Claimant worked six years in a garment plant thirty miles distant from her home, although she had no means of transportation and had to arrange with others for rides to and from work. When circumstances developed that she could no longer arrange transportation, she quit her job and applied for work at another garment plant where she would be able to ride with other workers, but no job was available to her at that plant. The claims examiner disqualified the claimant under section 5(a) of the Mississippi Employment Security Law.[1] The appeals referee found that the claimant had left her work voluntarily and without good cause within the meaning of section 5(a) and affirmed the decision of the claims examiner disqualifying the claimant from benefits. On appeal to the Board of Review, the decision of the appeals referee was affirmed. The claimant then filed her petition in circuit court which reversed the Board of Review and concluded that while a strict construction of the statute might disqualify the claimant, "the spirit of the law in such a hardship case should allow her benefits." Held: Reversed. Quitting a job because of lack of transportation between home and work is not "good cause" for leaving the employment and renders the claimant ineligible for unemployment benefits. *Mississippi Employment Security Comm'n v. Ballard*, 174 So. 2d 367 (Miss. 1965).

The requirements that the claimant must be "available for work"[2] and that he left his previous employment for "good cause"[3] are included in most state statutes to test the unemployed person's eligibility for benefits under the unemployment compensation acts. The Illinois court has said the question of availability for work is intended to test the individual's present attachment to the potential labor supply of his area,[4] and generally the question of availability is answered when the claimant

[1]Miss. Code Ann. § 7379(a) (Supp. 1964).

[2]*E.g.*, Tenn. Code Ann. tit. 50 § 1323(c) (Supp. 1964).

[3]*E.g.*, Ga. Code Ann. tit. 54 § 610(a) (1961).

[4]Mohler v. Department of Labor, 409 Ill. 79, 97 N.E.2d 762 (1951).

is ready and willing to accept a suitable job where there is an available labor market and he has no good cause to refuse the work.[5] Several courts have stated that the requirement is dependent in part upon the particular circumstances of each case and not wholly determinable by any set rule.[6] In addition, to be available for work, an individual must have a genuine desire to get a job and be willing and ready to take work.[7] A claimant's availability for work may be influenced by conditions beyond his control as in the cases where he cannot obtain transportation to his usual labor market area, but if he is willing to accept work which can be reached, the lack of transportation to his usual work area should not exclude him from eligibility to receive compensation.[8] In regard to the "good cause" for leaving previous work, the Pennsylvania court has pointed out that physical and mental conditions or personal and family problems may have exerted pressure upon the employee to quit his previous employment in what might appear to be a wholly voluntary action when, in fact, the leaving was wholly involuntary.[9] The court in construing the Pennsylvania act, said that when the statute does not require that good cause for leaving work be connected with the work, the legislature evidently intended that when an individual voluntarily leaves his job under the pressure of circumstances which may be reasonably viewed as compelling, the quitting is for good cause for purposes of the act.[10] A wife who quit her job to move with her soldier-husband was held to have left with good cause.[11]

The Mississippi Unemployment Compensation Act was passed in 1936[12] in conformity with the Social Security Act of 1933. The Mississippi law substituted the "insurance" principle of unemployment compensation for the "relief" principle, and benefits were made payable according to the employee's work record and his present relationship to the labor market rather than in relation to the individual's need.[13] The act provides, as one of the eligibility requirements, that the claimant must be "available for work,"[14] and that one will be disqualified for compensation if he left his last job "voluntarily without good cause."[15] Public policy in regard to the Unemployment Compensation Act has been stated to be a favorable construction of the law for those who are unemployed through no fault of their own and who left their last

---

[5]*Ibid.*

[6]*E.g.*, Swanson v. Minneapolis-Honeywell Regulator Co., 240 Minn. 449, 61 N.W.2d 526 (1953).

[7]*E.g.*, Dwyer v. Appeal Bd., 321 Mich. 178, 32 N.W.2d 434 (1948).

[8]Freeman, *Able To Work And Available For Work*, 55 YALE L.J. 123, 131 (1945).

[9]Bliley Elec. Co. v. Unemployment Compensation Bd. of Review, 158 Pa. Super. 548, 45 A.2d 898 (1946).

[10]*Ibid.*

[11]Department of Labor & Indus. v. Unemployment Compensation Bd. of Review, 154 Pa. Super. 250, 35 A.2d 739 (1944).

[12]Miss. Laws 1936, ch. 176.

[13]Todd, *Appeals And Judicial Review Under The Mississippi Unemployment Compensation Law*, 13 MISS. L.J. 501 (1941).

[14]MISS. CODE ANN. § 7378(c) (Supp. 1964).

[15]MISS. CODE ANN. § 7379(a) (Supp. 1964).

jobs involuntarily.[16] The law provides, in keeping with usual legislative action setting up administrative agencies, that findings of fact by the Board of Review, when supported by evidence, will be conclusive on appeal and only questions of law will be considered by the court.[17] The administrative agency is left free to define the term "available for work" and to determine what circumstances constitute "good cause" for voluntarily leaving the last job, as these are considered to be practical matters of fact and circumstances.[18] However, the court in a recent case addressed itself directly to the question of "good cause" and construed the restriction to render ineligible one who voluntarily quit a job to open his own business.[19] The burden of proof is upon the claimant to establish his right to benefits,[20] and the burden never shifts during the course of the trial.[21] The Georgia court in *Huiet v. Wallace* denied benefits when the claimant had received a referral to a job eight miles from her home and could not obtain transportation.[22] Oklahoma denied benefits to a claimant without transportation to any suitable work after he had received a job referral.[23] Note that both the Georgia[24] and Oklahoma[25] statutes provide that in order to constitute "good cause" for quitting previous employment, the cause must be connected with the work. Such work-connected requirement is not included in the Mississippi statute.[26] Under the Pennsylvania law, which does not include the provision that the cause be work-connected,[27] the court concluded that the lack of transportation to a job twelve miles from home was not an insurmountable difficulty and that passively quitting the job for that reason was not cause sufficiently compelling and necessitous as required by law.[28] A wife who voluntarily left employment to join her husband in another city was held to have quit with "good cause" and was entitled to benefits.[29]

Apparently the subject case presents the first appeal of the specific

---

[16]Mills v. Mississippi Employment Security Comm'n, 228 Miss. 789, 89 So. 2d 727 (1956).

[17]Miss. Code Ann. § 7388 (Supp. 1964); Mississippi Employment Security Comm'n v. Blasingame, 237 Miss. 744, 116 So. 2d 213 (1959).

[18]Todd, *Appeals And Judicial Review Under The Mississippi Unemployment Compensation Law*, 13 Miss. L.J. 501, 502 (1941).

[19]Mississippi Employment Security Comm'n. v. Medlin, 171 So. 2d 496 (Miss. 1965).

[20]*E.g.*, Jacobs v. Office of Unemployment Compensation & Placement, 27 Wash. 2d 641, 179 P.2d 707, 713 (1947).

[21]Haynes v. Unemployment Compensation Comm'n., 353 Mo. 540, 183 S.W.2d 77 (1944).

[22]Huiet v. Wallace, 108 Ga. App. 208, 132 S.E.2d 523 (1963).

[23]Copeland v. Oklahoma Employment Security Comm'n., 197 Okla. 429, 172 P.2d 420 (1946).

[24]Ga. Code Ann. tit. 54, § 610(a) (1961).

[25]Okla. Stat. Ann. tit. 40, § 215(a) (1951).

[26]Miss. Code Ann. § 7379(a) (Supp. 1964).

[27]Pa. Stat. Ann. tit. 43, § 802(a) (1964).

[28]Zupancic v. Unemployment Compensation Bd. of Review, 186 Pa. Super. 252, 142 A.2d 395 (1958).

[29]Berry, Whitson & Berry v. Division of Employment Security, 21 N.J. 73, 120 A.2d 742 (1956).

questions in Mississippi. It appears that the court relied wholly upon the construction of "good cause" as formulated by the Board of Review in denying benefits. In the noted case the court seems to have construed the questions of "good cause" and "availability for work" as one issue. Had they been considered separately, a different result might have been attained. The court here made no determination that the claimant was not presently available for work, for by her own testimony she had applied for work in at least one plant where transportation was available and she had received no referral which might have determined whether she would limit her availability to the employment for which she had applied. The Alabama court has held that an employee was available for work while living in a town in which there were only two suitable places of employment and he was discharged from one and applied unsuccessfully to the other.[30] It seems that the issue of good cause for quitting the previous employment might be compared with that of good cause for refusing employment. In an earlier Alabama case, a disability justifying a refusal of work was held to constitute a good cause for quitting a job of the same nature.[31] In the noted case, the previous employment was located at such distance from the claimant's home that a question might be raised regarding suitability of that work even though she had overcome the disadvantage for a period of six years and built up her unemployment credits there. Good cause for not taking such employment might well be considered good cause for leaving the same employment.

George Harold Noe

[30]Alabama Dep't. of Indus. Relations v. Anderson, 41 Ala. App. 267, 128 So. 2d 532 (1961).

[31]Department of Indus. Relations v. Chapman, 37 Ala. App. 680, 74 So. 2d 621 (1954).

RECENT BOOKS

FEDERAL TAXATION—BASIC PRINCIPLES AND PROCEDURES. George Dana Brabson. Cincinnati, Ohio: The Fred C. Rosselot Company, Inc., 1965. Pp. 348. $15.00.

The law of federal taxation has become extremely complicated. The philosophy, if any, which guides it has, for the most part, been successfully concealed, or, at least, badly obscured by the uninspiring provisions, details, rules, and quadruply sub-paragraphed exceptions with which the statutes and regulations are replete. It has become, in fact, almost the exclusive province of the expert.

Despite these facts the law imposes upon every wage earner, every farmer, the operator of the corner grocery, every businessman, and, in fact, upon everyone, the nondelegable and absolute responsibility for making a correct return and computation of his tax obligation. Obviously this is a task beyond the capability of many taxpayers. Nevertheless, the law imposes serious civil penalties, with summary processes for collection, and heavy sanctions in many cases for the misconstruction of the tax laws.

The Internal Revenue Service, faced with incredible difficulties, has been of tremendous assistance to the taxpayer by devising forms which, while still very complicated, do at least enable the American public to struggle through the task of making returns. This still leaves unfulfilled, however, the need for an understanding of the law at the time the transactions take place out of which the obligations grow.

In the light of all of these difficulties, Professor Brabson has undertaken, as he says,

> To resuscitate the basic and fundamental principles upon which the whole system of federal taxation rests, and to present them to the student of taxation as well as to the lawyer, accountant, and businessman in such a way that they can grasp the inherent tax problems whenever and wherever they arise.[1]

The opening paragraph of the author's preface indicates the need for such a work as he has undertaken.

> Federal taxation has become so complicated and detailed that its underlying principles have been greatly obscured over the years by a mass of rulings, opinions, and court decisions. The literature on the subject has been multiplied and duplicated to such an extent that the average taxpayer is unable to find the answer to even the simpler problems arising out of day-to-day business transactions.[2]

Professor Brabson's book is well organized for the purpose he has stated.

---

[1] BRABSON, FEDERAL TAXATION—BASIC PRINCIPLES AND PROCEDURES iii (1965).
[2] *Ibid.*

This work makes no pretext of being an exhaustive treatise on the law of federal taxation. It undertakes, in eleven (11) chapters, to afford an easy-to-read summary and guide. He undertakes to explain in his first chapter the constitutional basis of federal tax laws and federal taxing authority. He gives a very lucid explanation of several of the important tax concepts, including the concepts of gross income and exclusions, constructive receipt, deductions from gross income, taxable net income, exemptions in credit, capital gains and losses, and entities subject to taxation. His treatment of adjusted gross income does not seem adequate, even in a summary work, but on the contrary, may be misleading.

The author includes a twenty-two (22) page chapter on the rights and remedies of taxpayer procedures. Keeping in mind the purpose of the author, this is an excellent chapter and gives the student, lawyer, accountant, or businessman reading it a clear general understanding of his rights and remedies, and of the procedure through which they may be exercised. Other chapters of the book include tax considerations in the formation of corporation and in corporate liquidations and distributions. The principles and the methods of dissolution are treated separately and one chapter is devoted to the formation, operation, and dissolution of partnerships, viewed in the light of tax consequences at each step.

The author devotes one chapter of twenty-six (26) pages to a treatment of the handling of gift and estate taxes. The manner of treatment may be illustrated by a quotation from page 205,

> *Special Cases of Estate Tax Liability*
>
> In a broad sense it can be said that the estate tax was designed to cover the transfer at death of all property and property rights owned by or available to the decedent at the time of death which taken together constituted his economic enjoyment. In order to see in perspective the wide scope and application of the estate tax these categories of property and property rights may be briefly summarized as follows, together with the reference to the specific code sections in each case. . . . (6) transfers of property or property rights by decedent during his lifetime if he reserved or retained in any manner the power to alter, amend, revoke or terminate the gift. Section 2038.

Summaries of this character are set out for IRC §§ 2033 through 2042 in this field of taxation. The quotation above generally illustrates the outline type treatment given to specific sections.

The organization of employee benefit plans and the handling of bankruptcies and receiverships is also treated in a similar vein. The final chapter discusses particular taxes relating to individuals and brings in the 1964 Revenue Act revisions.

As a whole the book has the advantage of brevity, consisting of only three hundred seventeen (317) pages of rather a large type. While this book will not serve, and does not purport to serve, the same purpose as a general tax service, it is a useful work and will enable the student or practitioner to get the sense of the broad concepts and it will lead him into the specific statutes and regulations. It is well

worth examination and study by lawyers and students who are seeking a basic and general grasp of this most complex area of law.

Joel Blass
Professor of Law
University of Mississippi

MANUAL FOR THE LEGAL SECRETARIAL PROFESSION. National Association of Legal Secretaries. St. Paul, Minnesota: West Publishing Co., 1965. Pp. 580. $7.50.

At last there has been a book published especially for the career legal secretary, and designed to bring forth the professional aspects of her work. It is not uncommon for a legal secretary to perform the same duties year after year without comprehending the significance of what she is doing. The Manual can fill an important void in the education of the experienced legal secretary, as well as serve as the major text for courses in legal secretarial practices.

The pattern is followed of setting down the employment opportunities, the basic skills required, and the professional responsibility of a legal secretary. It is pointed out that employment opportunities for legal secretaries are varied and many, and the legal secretarial field is an expanding one due to the increase in our population, the complexity of our laws and the awareness of individuals of the necessity for legal services. The Manual notes that although in some instances the entrance salary of the inexperienced legal secretary is lower than in some other businesses, the long range comparison of the salary of the legal secretary with that of a secretary in other fields is very favorable.

Basic requirments peculiar to law office work are listed for consideration by potential legal secretaries. The importance of keeping every case confidential is stressed, as well as the need for maintaining a professional attitude in relation to clients, employer, court employees and the general public. The Manual points out the essential need for a legal secretary always to keep in mind that any error or omission on her part may cause serious financial or professional responsibility to the client. Failure to execute instructions as dictated, or the careless preparation of a legal document may have extremely serious consequences to the attorney. She must always remember that she is working in a professional office and her responsibilities should always be discharged on a professional basis.

The program of the National Association of Legal Secretaries, which has been inaugurated to assist a legal secretary in attaining a professional status, is explained. The legal secretary with a minimum of five years experience can take an examination covering written communications, skill and knowledge, human relations, secretarial procedures and office management, secretarial accounting, legal terminology, techniques and procedure, and legal secretarial skills. Although the Manual implies no easy way or guarantee the passing the examination, it nevertheless, provides an orderly and systematic plan for preparing for the PLS examination.

The Manual sets down certain standards which are elementary, but nevertheless important, concerning the legal secretary as supervisor of other law office employees, her relationship with clients, her employer, and legal secretaries in other law offices and professional associations.

Definitions of the American Legal System, court procedures, court jurisdictions and officers are given in interesting and easily understood terms, providing the legal secretary (although she does not practice law), with the information she will need to become familiar with and gain a thorough understanding of the legal and political systems of the state in which she is employed, and enable her to be intimately familiar with the precise name of each of the courts in her state.

The step by step sequence of a typical civil action, from discovery to trial, is explained in great detail. Domestic relations, probate, corporation, federal, administrative, criminal and appellate court procedures are covered generally, of necessity with detailed explanations of why this information is necessary to the legal secretary and how she should use it.

A detailed, illustrated guide to legal research is included in the Manual, written in such a manner that the average legal secretary will be able to follow the procedures set forth. This information will provide the average legal secretary with the ability to assist her employer with his research, if requested, and help her to understand the nature of legal publications and to be able to use them.

General rules for the preparation of legal instruments, a comprehensive glossary, tables of Latin words and phrases and legal abbreviations, and an extensive bibliography for the legal secretary who needs coverage of a specific topic are very practical and helpful sections of the Manual.

Interesting portions of the Manual concern the proper attire and demeanor of the legal secretary. The attorneys should all appreciate the paragraph concerning coffee breaks:

> Don't abuse these privileges. Your employer is paying you to work—not for prolonged rest periods or coffee/cigarette breaks.

The Manual has obviously been compiled by legal secretaries who know their business. It is practical, usable and easily understood, and is an important addition to the modern law library.

Mrs. Barbara Waldrop, President
Mississippi Association of Legal Secretaries

BOOK NOTES

CONTRACT LAW IN AMERICA. Lawrence M. Friedman. Madison, Wisconsin: University of Wisconsin Press, 1965. Pp. 280. $6.50.

The author tests conventional estimates of the legal and social significance of contract law against the actual workings of the legal order in a specific social context, and demonstrates that many of the standard abstractions in the case-law of contract no longer have great relevance to the needs of society and the practice of the courts.

DISCRIMINATION AND THE LAW. Edited by Vern Countryman. Chicago, Illinois: University of Chicago Press, 1965. Pp. 170. $5.00...

The essential theme of this book is the constitutional law of race discrimination in the four basic areas of employment, education, public accommodation, and housing.

ESSAYS IN CRIMINAL SCIENCE. Edited by Gerhard O. W. Mueller. South Hackensack, N.J.: Fred B. Rothman & Co., 1961. Pp. 460. $10.00.

Eighteen of the world's foremost criminal scientists were invited to write on a subject which was of particular interest to them, and the result is an unusually stimulating collection of essays which are comparative in outlook and represent every aspect of criminal science.

FEDERAL FOOD, DRUG, AND COSMETIC ACT 1961-1964. Vincent A. Kleinfeld and Alan H. Kaplan. Chicago, Illinois: Commerce Clearing House, Inc., 1965. Pp. 913. $27.50.

This book presents an authoritative record of the legislative, judicial, and administrative actions taken in connection with the Federal Food, Drug, and Cosmetic Act for the period 1961 through 1963.

FEDERAL ESTATE AND GIFT TAXES EXPLAINED. Commerce Clearing House Editorial Staff. Chicago, Illinois: Commerce Clearing House, 1965. Pp. 284. $4.00.

This book is designed to aid everyone who works with federal estate and gift taxes in areas of planning, instrument drafting, reporting and paying the taxes.

MEDICARE AND SOCIAL SECURITY EXPLAINED. Commerce House Editorial Staff. Chicago, Illinois: Commerce Clearing House, Inc., 1965. Pp. 176. $2.50.

An explanatory run-down on the pertinent new provisions of the 1965 Security-Medicare Program.

BOOKS RECEIVED

CRIMINAL JUSTICE IN OUR TIME. Edited by A. E. Dick Howard. Charlottesville, Virginia: University Press of Virginia, 1965. Pp. 161. $1.75.

EQUAL JUSTICE UNDER THE LAW: THE SUPREME COURT IN AMERICAN LIFE. Washington, D.C.: The Foundation of the Federal Bar Association, 1965. Pp. 143. $1.25.

THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION. Edited by Harry W. Jones. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965. Pp. 177. $1.95.

NEW AND IMPORTANT

Companion Books:

NADLER, THE LAW OF BANKRUPTCY, SECOND EDITION

The Second Edition embraces all of the Statutory changes and important judicial decisions which have arisen during the seventeen year period since the publication of the First Edition in 1948. The impact of the changes by the Uniform Commercial Code on Bankruptcy Law are indicated.

Contains:

ORDERS and FORMS—BANKRUPTCY CODES

A handsome Binder Volume, about 1500 pages bound in Blue Fabrikoid Genuine Gold Stamping.

Price $38.00

NADLER, THE LAW OF DEBTOR RELIEF, One Volume with 1962 Pocket Part

Covering Non-Bankruptcy Devices—Arrangements Under the Bankruptcy Act—Chapters under Wage Earners Plans—Corporate Reorganizations Under Chapter X of the Bankruptcy Act.

Price $25.00

Special Combination Price for Both of these Works in One Order

Price $60.00

THE HARRISON COMPANY

Law Book Publishers

178-180 Pryor St. S.W. (P.O. Box 4214) Atlanta, Ga., 30303

MISSISSIPPI REPRESENTATIVE
Mr. Ben A. Hinson

LAW BOOKS

MISSISSIPPI PUBLICATIONS:

Southern Reporter
- Complete Sets — Weekly Service
- Back Volumes to Complete Your Set

West's Mississippi Digest
- Complete Coverage of every Mississippi Case

Southern Digest
- The Famous Key Number Reporter Digest

Alexander's Mississippi Jury Instructions

FEDERAL PUBLICATIONS:

United States Code Annotated
Federal Reporter & Supplement
Modern Federal Practice Digest
U. S. Supreme Court Reporter
U. S. Supreme Court Digest
Federal Rules Decisions
Barron & Holtzoff Federal Practice
West's Federal Forms
West's Federal Practice Manual

TEXT BOOKS AND TREATISES:

Administrative Law, Davis
Admiralty, Gilmore & Black
Approved Appellate Briefs, Appleman
Automobiles, Blashfield
Bankruptcy, Cowans
Contracts, Corbin
Corporations, Hornstein
Criminal Correction, Law of
Criminal Law, Perkins
Evidence, Conrad
Federal Jury Practice and Instructions
Future Interests, Simes & Smith
Insurance, Appleman
Jurisprudence, Pound
Model Business Corporation Act Annotated
Oil & Gas Law, Summers
Titles, Basye, Flick, Patton
Torts, Prosser
Trusts & Trustees, Bogert

FORM BOOKS:

Modern Legal Forms
West's Federal Forms

DICTIONARIES:

Black's Law Dictionary
Bouvier Law Dictionary

BOOKS OF GENERAL REFERENCE:

Words & Phrases
Decennial & General Digests
Corpus Juris Secundum
Uniform Commercial Code

REPORTERS:

Atlantic
New York Supplement
North Eastern
North Western
Pacific
South Eastern
South Western
Southern

Ask for information about any law book published

WEST PUBLISHING COMPANY

50 Kellogg Blvd. St. Paul, Minnesota 55102